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IN THE

Supreme Court of the United States

CITY OF RANCHO PALOS VERDES, *et al.*,
Petitioners,

v.

MARK J. ABRAMS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

CAROL W. LYNCH
City Attorney
City of Rancho Palos Verdes
ROCHELLE R. BROWNE
T. PETER PIERCE
RICHARDS, WATSON & GERSHON, P.C.
355 So. Grand Avenue
40th Floor
Los Angeles, CA 90071-3101
(213) 626-8484

JEFFREY A. LAMKEN
Counsel of Record
MARK T. STANCIL
BAKER BOTTS L.L.P.
1299 Pennsylvania Avenue, NW
Washington, D.C. 20004-2400
(202) 639-7700

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QUESTION PRESENTED

The Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, as amended by the Telecommunications Act of 1996, 47 U.S.C. § 251 *et seq.*, expressly preserves "the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities," such as antenna towers used to provide cellular telephone service. 47 U.S.C. § 332(c)(7)(A). The Act also establishes limits on that state and local authority, requiring (among other things) that state and local decisions regulating the placement and construction of wireless service facilities be in writing, be supported by substantial evidence, not unreasonably discriminate among providers of functionally equivalent services, and not have the effect of preventing the provision of wireless telephone service. 47 U.S.C. § 332(c)(7)(B)(i), (iii). The Act further provides an express cause of action through which "[a]ny person adversely affected" by a decision alleged to be contrary to those limits may seek judicial review, subject to a 30-day limitations period. 47 U.S.C. § 332(c)(7)(B)(v). The question presented is:

Whether, as held below but contrary to decisions of the Third and Seventh Circuits, the limits on state and local zoning and land-use authority established by Section 332(c)(7)(B) of the Communications Act may be enforced through an action for damages and attorney's fees under 42 U.S.C. §§ 1983 and 1988.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners the City of Rancho Palos Verdes (a municipality) and the City of Rancho Palos Verdes City Council were defendants-appellees in the court of appeals. Respondent Mark J. Abrams was the plaintiff-appellant in the court of appeals. Frank Lyon, John Cartwright, Thomas Long, Craig Mueller, Theodore Paulson, Donald Vannorsdall, John McTaggart, Douglas W. Stern, Lee Byrd, Barbara Ferraro, Marilyn Lyon, and Larry Clark (individual members of the City Council and the City Planning Commission) were defendants in district court.

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PETITION FOR A WRIT OF CERTIORARI

The City of Rancho Palos Verdes, California, and the City Council of the City of Rancho Palos Verdes, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is reported at 354 F.3d 1094 (9th Cir. 2004). The order and opinions of the district court (App., *infra*, 13a-15a, 16a-33a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 2004. A petition for rehearing was denied on March 16, 2004 (App., *infra*, 65a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Communications Act, 47 U.S.C. § 151 *et seq.*, and of 42 U.S.C. §§ 1983 and 1988, are set forth in the Appendix at App., *infra*, 66a-79a.

STATEMENT

This case concerns whether municipalities and state and local officials who make zoning and other land-use decisions alleged to be inconsistent with a provision of the Communications Act, 47 U.S.C. § 332(c)(7), are subject to actions for damages and attorney's fees under 42 U.S.C. §§ 1983 and 1988. The Third and Seventh Circuits have answered that question in the negative, holding that the expedited judicial review expressly provided by the Communications Act, 47 U.S.C. § 332(c)(7)(B)(v), provides the appropriate remedy. In the decision below, the Ninth Circuit reached the opposite result, following a vacated decision of the Eleventh Circuit.

1. The Communications Act of 1934 ("Communications Act" or "Act"), 47 U.S.C. § 151 *et seq.*, "established a comprehensive system for the regulation of communication

by wire and radio" and "created * * * the Federal Communications Commission" to carry out the Act's underlying policies. *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 6 (1942). In 1996, Congress amended the Communications Act to foster greater competition and innovation in local telephone and other communication services. See Telecommunications Act of 1996 ("1996 Act"), Pub. L. No. 104-104, 110 Stat. 56. Of particular relevance here, the 1996 Act created a new provision—codified as 47 U.S.C. § 332(c)(7)—to address the relationship between local zoning and the siting of antennae for cellular and other wireless telephone services. 1996 Act, § 704, 110 Stat. at 151-152.

That provision, as initially drafted, "would have allowed the FCC total federal preemption of state authority to regulate tower siting." *Sprint Spectrum L.P.* v. *City of Carmel*, 361 F.3d 998, 1003 (7th Cir. 2004). Congress, however, "rejected this approach," enacting Section 332(c)(7) to "leave[] zoning authority in the hands of state and local governments," subject to specified limits. *Ibid.*; see H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 207-208 (1996) (Section 332(c)(7) "prevents [FCC] preemption * * * and preserves the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth.").

Titled "Preservation of local zoning authority," Section 332(c)(7) states that, "[e]xcept as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. § 332(c)(7)(A). The next paragraph establishes limits on that authority. It provides that state and local "regulation of the placement, construction, and modification of personal wireless service facilities" may neither "unreasonably discriminate among providers of functionally equivalent services," 47 U.S.C. § 332(c)(7)(B)(i)(I), nor "prohibit or have the effect of prohibiting the provision of personal wireless services," 47

U.S.C. § 332(c)(7)(B)(i)(II). Further, state and local authorities must act on requests to "place, construct, or modify" wireless service facilities "within a reasonable period of time," 47 U.S.C. § 332(c)(7)(B)(ii), and any decision denying a request must "be in writing and supported by substantial evidence contained in a written record," 47 U.S.C. § 332(c)(7)(B)(iii). States and municipalities thus retain "the flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently"; even "if a State or local government grants a permit in a commercial district," there is no requirement that it "also grant a permit for a competitor's 50-foot tower in a residential district." H.R. Conf. Rep. No. 458, *supra*, at 208.

To enforce those limits on local zoning authority, the Act provides an express cause of action for expedited judicial review, subject to a 30-day limitations period:

> Any person adversely affected by any final action or failure to act by a State or local government * * * that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis.

47 U.S.C. § 332(c)(7)(B)(v).[1]

2. This is the second lawsuit between respondent Mark J. Abrams and the City of Rancho Palos Verdes, California ("the City"), in connection with respondent's construction and commercial use of antenna towers in the yard of his single-family residence. Respondent holds numerous FCC licenses and provides two-way radio communications and other services for profit, individually and as a principal in a

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[1] The Act also prohibits state and local governments from regulating facility placement based on the "environmental effects of radio frequency emissions," so long as the facilities comply with FCC emission rules. 47 U.S.C. § 332(c)(7)(B)(iv). Persons adversely affected by violations of that prohibition may bring the action for judicial review described above or "petition the [FCC] for relief." 47 U.S.C. § 332(c)(7)(B)(v).

company called Mobile Relay Associates; he is also a licensed amateur (or "ham") radio operator. App., *infra*, 2a; Certified Administrative Record (Admin. Rec.) 434, 863. At all relevant times, respondent resided in the Del Cerro neighborhood of the City of Rancho Palos Verdes. Respondent's property and the surrounding neighborhood are zoned for detached, single-family residences in a low-density environment.[2]

a. Between 1989 and 1990, respondent applied for and received permission from the City's Planning Department to erect a radio antenna in the backyard of his residence, solely for amateur use. The application approved by the Planning Department showed a 30-foot tower with a 10-foot retractable mast, so that the tower would "extend to 40 [feet] and nest at 30 feet." Admin. Rec. 2; see *id.* at 14; App., *infra*, 24a. The City's Municipal Code barred the construction of any antenna taller than 40 feet unless the applicant obtained a minor exception permit, which respondent did not seek. See Rancho Palos Verdes Mun. Code § 17.04.050(B)(4), (8); Admin. Rec. 335. After the City approved the tower, respondent submitted to the City's Building and Safety Division construction plans depicting a structure with a fixed height of 52.5 feet. Admin. Rec. 50-51. Apparently unaware that the Planning Department had approved a tower with a maximum height of 40 feet, the building inspector stamped the plans as approved, *ibid.*, and respondent erected the 52.5-foot tower. See App., *infra*, 54a.[3] Despite an express condition proscribing use of the antenna tower for commercial purposes, respondent used the tower and related antennae to provide commercial radio services. *Id.* at 2a, 34a-35a.

[2] The City, population 41,000, is located on the scenic Palos Verdes peninsula, about 23 miles from downtown Los Angeles. The Del Cerro neighborhood is near the top of a ridge about two miles from the coast.

[3] The safety inspector's stamp stated that the "stamping of these plans and specifications SHALL NOT be held to permit or be an approval of the violation of any provisions of any City Ordinance or State Law." Admin. Rec. 50, 620. As a result, there was some dispute as to whether the safety inspector's final approval rendered the tower lawful despite the Municipal Code's prohibition on towers taller than 40 feet absent a special use permit. See, *e.g.*, *id.* at 169-170, 307-308, 312-313, 332.

While the City was investigating the suspected commercial uses, respondent erected another antenna tower, this time on a trailer in his yard, and extended it to a height of over 100 feet. Admin. Rec. 867-868, 1302. Respondent did not seek a permit for the new tower. Instead, he advised the City that, in his view, the tower was a "mobile" antenna not covered by the Municipal Code. Although respondent eventually lowered the tower to 75 feet, he declined to remove or fully retract it. *Id.* at 868, 966-967. The City therefore filed an action for declaratory and injunctive relief against respondent in Los Angeles County Superior Court on April 12, 1999, alleging that the antennae and their commercial use violated the City's zoning ordinance. On September 13, 1999, the Superior Court preliminarily enjoined respondent from unauthorized commercial use of the towers and required respondent to remove the trailer-mounted tower. C.A. E.R. 21-23.

b. After the Superior Court issued the injunction, respondent applied for a conditional use permit (or "CUP") to allow him to offer commercial radio services using the 52.5-foot antenna tower in his backyard. The Staff of the City's Planning Department prepared an 18-page report assessing the impact of converting the tower to commercial use; it recommended that the application be denied. Admin. Rec. 553-570; see *id.* at 878-885. After conducting two public hearings and taking written evidence, the Planning Commission adopted a resolution denying the application. App., *infra*, 54a-64a. The resolution stressed the tower's "visual[] prominen[ce] within the neighborhood" and its "negative visual impacts." *Id.* at 57a, 60a-61a. The Commission found that the commercial use of such a prominent structure would be inconsistent with the purpose and character of the neighborhood, as well as the City's Antenna Development Guidelines, which encourage the placement of commercial antennae "in non-single family

residential areas." *Id.* at 59a, 60a. Finally, the Commission addressed the Communications Act, finding its decision consistent with each of the Act's requirements. *Id.* at 61a-63a.

Respondent appealed to the City Council. After additional public hearings, the Council adopted a resolution upholding the Planning Commission's decision. App., *infra*, 34a-53a. Like the Planning Commission, the City Council concluded that the proposed use was inconsistent with the neighborhood's zoning under the City's General Plan, which designated it for detached, single-family residences. That designation permits "accessory" structures, *i.e.*, structures closely linked, incidental, and subordinate to the property's use as a single-family residence. The Council found that the proposed commercial use was neither incidental nor subordinate to the property's primary use as a residence. *Id.* at 43a.

The City Council noted that, when the City initially authorized respondent to build the antenna tower, respondent had "expressly agreed" that it "was not to exceed forty feet in height" and was "not to be used for commercial purposes." App., *infra*, 39a-40a. "Notwithstanding those conditions, the antenna structure was constructed at a height of fifty-two and one-half feet," *id.* at 40a, and respondent used it for commercial purposes, *id.* at 34a-35a. "[I]t appears that one of the purposes of the existing antenna structure at its current height of fifty-two and a half feet," the Council also found, "was to accommodate the commercial use[s]." *Id.* at 40a-41a.

The Council found that the resulting structure and antenna array were "highly visible" and caused adverse "visual and aesthetic impacts" on the surrounding properties and neighborhood. App., *infra*, 46a, 48a. Because of the tower's location and the size of respondent's lot, the City Council found that the adverse visual impact could not be addressed except by modifying the tower's height, location, or configuration. *Id.* at 38a-39a. Respondent, however, advised the Council "that he would not consider any alteration or reduc-

tion of the height, size, configuration or location of the existing tower." *Id.* at 39a; see *id.* at 41a, 46a-47a.

The City Council conceded that permitting commercial use of the tower would not, by itself, alter the tower's visual impact. But the Council found that commercial use of the 52.5-foot tower would "perpetuate [its] existing adverse visual impacts." App., *infra*, 41a.[4] Echoing the Planning Commission's concerns, see *id.* at 51a, 60a, the Council also found that "the establishment of a commercial antenna of this size and scale in the *Del Cerro* neighborhood would establish precedent for, and contribute to, adverse cumulative visual impacts due to future proposals for similar projects," *id.* at 41a. "Such proposals are likely," the Council observed, "given the neighborhood's elevation * * * and unique geographic setting." *Ibid.*

Finally, the City Council found that its decision was consistent with 47 U.S.C. § 332(c)(7). There was no discrimination among service providers because the denial rested on the "adverse visual and aesthetic impacts" of the tower and respondent's refusal to mitigate those effects. App., *infra*, 48a. Nor did the denial prohibit the provision of wireless services. *Ibid.* The City's expert "demonstrated that there is

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[4] Although the Council did not explain the finding of "perpetuation," the Council appears to have been concerned that granting the permit would accord the 52.5-foot tower, which at that time was of questionable legality, permanent status as a lawful structure. See p. 4 n.3, *supra*; App., *infra*, 24a n.5 (addressing the City's claim that, after denying the permit, it might require that the tower be reduced in height or removed). In addition, so long as the tower was used solely to support a resident's hobby, it could be seen as a transitory structure that would be removed when the resident moved or gave up the hobby. Converting it to commercial use, in contrast, could create business reliance and afford the tower greater permanence. See *Sprint Spectrum, L.P.* v. *Town of Ogunquit*, 175 F. Supp. 2d 77, 83, 85 (D. Me. 2001) (noting opposition to conversion of amateur radio tower to commercial use because of the expectation that the tower would otherwise be removed when the amateur radio operator stopped using it as well as reluctance to issue a permit "confer[ring] permanent status to a tower they believe[d] to be temporary").

at least one alternative site in the City" where respondent's "ability to transmit would be increased above the level of coverage" obtained from his home "if an eighty-foot support structure were constructed." *Id.* at 45a. The City Council further found that respondent could overcome coverage problems by applying a different technology to broadcast from two or more smaller antennae at different sites. *Id.* at 47a, 49a-50a. Finally, the City noted that many companies were providing wireless service throughout the City "from facilities that are not causing" such "adverse visual and aesthetic impacts." *Id.* at 49a.

3. Respondent then filed a lawsuit in federal district court, alleging that the City violated 47 U.S.C. § 332(c)(7) by denying him a conditional use permit. Respondent asserted that the City's decision unreasonably discriminated among wireless providers, prohibited the provision of personal wireless service, and was not supported by substantial evidence. Pursuant to 47 U.S.C. § 332(c)(7)(B)(v), respondent sought an injunction requiring the City to issue a permit allowing commercial use of the tower. Respondent also sought damages and attorney's fees under 42 U.S.C. §§ 1983 and 1988, asserting that the City had violated his rights under the Communications Act. C.A. E.R. 14, 18. The district court initially stayed that action in light of the City's suit in Los Angeles Superior Court, but lifted the stay after the Superior Court entered judgment for the City in May 2001.

Following trial on a stipulated administrative record, the district court ruled for respondent, holding that the City's decision was not supported by "substantial evidence" as required by 47 U.S.C. § 332(c)(7)(B)(iii). App., *infra*, 16a-33a. The City's concern about the tower's visual impact, the district court held, was insufficient to justify denying the permit because the "antenna is already in existence, and thus there is no further aesthetic impact created by [respondent's] proposed use." *Id.* at 23a. The district court also rejected the City's argument that permitting commercial use would

contradict the "original intention of the 1990 permit" and "lead to the proliferation of more antennas," labeling the former rationale "immaterial," *id.* at 24a, and the latter "unfounded," *id.* at 25a. Other antenna applications might follow, but the City would not be required to grant permits that raise concerns such as "an increase in visual blight." *Ibid.*

The district court declined to resolve respondent's claim that the City had unreasonably discriminated among providers of functionally equivalent services, in violation of 47 U.S.C. § 332(c)(7)(B)(i)(I). App., *infra*, 29a-30a & n.8. The court, however, rejected respondent's claim that the City had precluded the provision of wireless services, in violation of 47 U.S.C. § 332(c)(7)(B)(i)(II). App., *infra*, 30a-32a. Other providers had successfully operated in the City consistent with municipal requirements, and there was at least one alternative site for respondent's antenna. *Id.* at 31a-32a.

The court ordered additional briefing and argument on appropriate remedies, finding that 47 U.S.C. § 332(c)(7)(B)(v) afforded it "broad authority" to fashion "an appropriate remedy that would bring expedited relief." App., *infra*, 32a. Following briefing and argument, the court entered an order vacating the City's denial of respondent's application, remanding the matter to the City, and enjoining the City to grant the application subject to reasonable conditions. *Id.* at 13a-15a. The district court denied respondent's "request for damages under 42 U.S.C. § 1983" and his corresponding request for "attorney's fees under 42 U.S.C. § 1988." App., *infra*, 15a. The remedies for violations of the Communications Act, the court stated, "are subsumed" within the Act's review provisions, and "damages pursuant to 42 U.S.C. § 1983 are not available." App., *infra*, at 14a.

4. Respondent appealed the district court's denial of damages and fees under 42 U.S.C. §§ 1983 and 1988, and the Ninth Circuit reversed. App., *infra*, 1a-12a (T.G. Nelson, joined by Kozinski, J., and the Hon. Jane A. Restani, U.S. Ct. of Int'l Trade, by designation). The Ninth Circuit acknowl-

edged that, under cases such as *Blessing* v. *Freestone*, 520 U.S. 329 (1997), and *Middlesex County Sewerage Authority* v. *National Sea Clammers Association*, 453 U.S. 1 (1981), a party cannot use Section 1983 to challenge the violation of a federal statute if that statute establishes a "comprehensive" remedial scheme that is incompatible with Section 1983 remedies. App., *infra*, 4a. The Ninth Circuit also agreed that the Communications Act, through 47 U.S.C. § 332(c)(7)(B)(v), creates a "private right of action" for "expedited judicial review," subject to "a short statute of limitations (30 days)." App., *infra*, 5a-6a. But the Ninth Circuit held that the Communications Act's remedial scheme is not sufficient to "close the door on § 1983 liability" because, according to that court, it "does not provide for any type of relief" and "contain[s] no remedies at all." *Id.* at 6a, 7a-8a.

In so holding, the Ninth Circuit rejected the Third Circuit's contrary conclusion in *Nextel Partners Inc.* v. *Kingston Township*, 286 F.3d 687 (2002), labeling that decision "flawed." App., *infra*, 8a.[5] The Ninth Circuit first faulted *Nextel*'s conclusion that the expedited right of action created by 47 U.S.C. § 332(c)(7)(B)(v) is "remedial." App., *infra*, 8a. The short limitations period, the Ninth Circuit stated, "can hardly" be considered remedial, since it "imposes a burden on an aggrieved plaintiff, not a benefit." *Ibid.* Similarly, the Ninth Circuit declared that expedited judicial review "does nothing to remedy" a Communications Act "violation in itself." *Id.* at 8a-9a; see *id.* at 9a (1996 Act "contains no remedial provisions"). Accordingly, the Ninth Circuit deemed relief under the Communications Act to be insufficiently beneficial to plaintiffs to be considered "comprehensive," since "[t]he only benefit to an aggrieved plaintiff is expedited judicial review." *Id.* at 8a.

[5] After this case was briefed and argued in the Ninth Circuit, the Seventh Circuit joined the Third Circuit in holding that Section 1983 and 1988 remedies are unavailable. See *Primeco Personal Communications Ltd. (d/b/a Verizon Wireless)* v. *City of Mequon*, 352 F.3d 1147 (2003). Although the parties brought that decision to the Ninth Circuit's attention before the Ninth Circuit issued its decision, the Ninth Circuit's opinion does not mention the Seventh Circuit's ruling.

The Ninth Circuit dismissed the Third Circuit's concern that allowing Section 1983 suits under the four-year limitations period presumably applicable to such actions would undermine the 30-day limitations period imposed by 47 U.S.C. § 332(c)(7)(B)(v). App., *infra*, 8a (citing *Nextel*, 286 F.3d at 695). "Congress can limit the time in which a plaintiff can file," the Ninth Circuit stated, "without inadvertently limiting the plaintiff's remedies at the same time." *Id.* at 9a.

Finally, the Ninth Circuit relied on the savings clause in Section 601(c)(1) of the 1996 Act, codified as 47 U.S.C. § 152 (note). App., *infra*, 10a-11a. That provision states that the 1996 Act "shall not be construed to modify, impair, or supersede Federal, state, or local law unless expressly so provided." *Id.* at 10a. The Ninth Circuit stated that deeming the rights created by the Communications Act to be enforceable solely through that Act's judicial review provisions would "impair" Section 1983. *Ibid.* The Ninth Circuit conceded that this Court had rejected a similar argument in *Sea Clammers*, 453 U.S. at 15-16, but distinguished the savings clauses in *Sea Clammers* as preserving federal "rights" rather than federal "laws."

Accordingly, the Ninth Circuit held that "Section 1983 remedies are available" and that "the district court should award § 1983 damages" in this case. App., *infra*, 2a, 12a. On March 16, 2004, the Ninth Circuit denied rehearing and rehearing en banc. *Id.* at 65a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision in this case holds that local governments that make zoning and land-use decisions alleged to be inconsistent with 47 U.S.C. § 332(c)(7)—a Communications Act provision entitled "Preservation of local zoning authority"—may be sued for damages and attorney's fees under 42 U.S.C. §§ 1983 and 1988. That holding squarely

conflicts with decisions of the Third and Seventh Circuits. The Ninth Circuit's decision, moreover, eviscerates this Court's decision in *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981), and effectively overturns the balance between obligations and remedies Congress struck in the Communications Act. Throughout that Act, Congress both identifies the relevant regulatory obligations and specifies the means for their vindication. Here, for example, the Act couples the limits on state and local zoning authority imposed by Section 332(c)(7)(B) with an express mechanism for private enforcement—a cause of action for expedited judicial review, subject to a 30-day limitations period. 47 U.S.C. § 332(c)(7)(B)(v). The Ninth Circuit, however, dismissed that express cause of action as providing "no remedies at all," and superimposed over it the broad damages and attorney's fees relief (and associated four-year limitations period) of Sections 1983 and 1988. The resulting distortion portends serious and immediate consequences for local governments. Cases alleging violations of Section 332(c)(7) are proliferating in the lower federal courts. Under the Ninth Circuit's decision, local governments now must choose between potentially massive monetary liability from even good-faith decisions to deny or limit antenna-tower construction requests, and the enduring consequences of inappropriately sited towers.

I. The Courts Of Appeals Are Divided On The Availability Of Section 1983 Damages And Section 1988 Fees For Communications Act Violations

When Congress added 47 U.S.C. § 332(c)(7) to the Communications Act in 1996, see Telecommunications Act of 1996 ("1996 Act"), Pub. L. No. 104-104, § 704, 110 Stat. at 151-152, it explicitly preserved state and local zoning authority over the siting and construction of antenna towers and other facilities used to provide wireless telephone service. 47 U.S.C. § 332(c)(7)(A). At the same time, Congress limited that authority by, among other things, requiring decisions that

deny authorization for wireless facilities to be supported by substantial evidence, and by providing that such decisions may neither unreasonably discriminate among providers of functionally equivalent services nor have the effect of foreclosing wireless service. See 47 U.S.C. § 332(c)(7)(B)(i), (iii); pp. 2-3, *supra*. Consistent with the 1996 Act's objective of preserving local zoning authority while encouraging the rapid deployment of wireless services, Congress paired those provisions with an express, but carefully circumscribed, private enforcement mechanism. In particular, Section 332(c)(7)(B)(v) authorizes an aggrieved party to seek expedited judicial review of an adverse zoning or permit decision within 30 days. The question in this case is whether such challenges may also be asserted as actions for damages and attorney's fees pursuant to 42 U.S.C. §§ 1983 and 1988.

Section 1983 creates a cause of action for the violation of "any rights, privileges, or immunities secured by the Constitution and laws" of the United States, while Section 1988(b) entitles successful Section 1983 plaintiffs to attorney's fees. See *Hensley* v. *Eckerhart*, 461 U.S. 424, 429 & n.2 (1983). In 1980, this Court concluded that the cause of action created by Section 1983 and associated remedies under Section 1988 are available not only for violations of constitutional rights, but also for violations of certain federal statutory rights. *Maine* v. *Thiboutot*, 448 U.S. 1, 12-13. The Court has since clarified that, "to seek redress through § 1983 * * * a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*." *Blessing* v. *Freestone*, 520 U.S. 329, 340-341 (1997); see *Gonzaga Univ.* v. *Doe*, 536 U.S. 273 (2002) (statute must create rights in plaintiff and not merely limit actions of defendant). In addition, Section 1983 damages and Section 1988 fees are not available where Congress has provided a comprehensive remedial scheme in the federal statute allegedly violated. "When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate

congressional intent to preclude the remedy of suits under § 1983." *Sea Clammers*, 453 U.S. at 20. Likewise, if "allowing § 1983 actions * * * 'would be inconsistent with Congress' carefully tailored scheme,'" relief is limited to that provided in the underlying statute. *Blessing*, 520 U.S. at 346.

Applying that framework to the Communications Act, the Third and Seventh Circuits have held that challenges to land-use decisions alleged to be inconsistent with 47 U.S.C. § 332(c)(7) may not be brought under Section 1983. *Nextel Partners Inc.* v. *Kingston Township*, 286 F.3d 687, 694 (2002) (Alito, J., joined by Becker, C.J., and Barry, J.); *Primeco Personal Communications Ltd. (d/b/a Verizon Wireless)* v. *City of Mequon*, 352 F.3d 1147 (2003) (Posner, J., joined by Kanne & Rovner, JJ.) (*Verizon Wireless*). The Ninth Circuit reached the opposite conclusion below, holding that "Section 1983 remedies are available." App., *infra*, 2a. In a decision that was later vacated, the Eleventh Circuit also concluded that Communications Act violations may be asserted under Section 1983. *AT&T Wireless PCS, Inc.* v. *City of Atlanta*, 210 F.3d 1322 (11th Cir.) (Wilson, J., joined by Carnes & Barkett, JJ.), *vacated on reh'g en banc*, 260 F.3d 1320, *dismissed on settlement*, 264 F.3d 1314 (2001).

A. In the Third Circuit's *Nextel* case, a wireless service provider sought to "build a 150 foot 'monopole' tower * * * in Kingston Township," Pennsylvania. 286 F.3d at 689. Nextel sued the Township, alleging that it had prohibited the provision of wireless services in violation of 47 U.S.C. § 332(c)(7)(B)(ii). After concluding that those claims were not properly before it under the expedited review provision of the Communications Act, 47 U.S.C. § 332(c)(7)(B)(v),[6] the Third Circuit held that Nextel could not press the same

[6] The court held that the Township's failure to issue a permit was not subject to review under Section 332(c)(7)(B)(v) because Nextel had "never filed" a permit request. 286 F.3d at 692. The court held that Nextel's related demand for an injunction against a Township ordinance became moot when the ordinance was amended. *Id.* at 693.

alleged Communications Act violations through a damages action under Section 1983. See 286 F.3d at 693-695.

The Third Circuit observed that 47 U.S.C. § 332(c)(7)(B)(v) creates an express cause of action to redress Nextel's claims. That provision permits persons aggrieved by violations of the Communication Act's tower-siting provisions to "file an action in any court of competent jurisdiction"; requires that "such an action be filed within a very short period—30 days"; and "correspondingly requires the court to 'hear and decide such action on an expedited basis.'" *Nextel*, 286 F.3d at 694-695. "While the remedial scheme * * * is not complicated," the Third Circuit explained, "it is comprehensive in the relevant sense: it provides private judicial remedies that incorporate both notable benefits and corresponding limitations." *Id.* at 694. The expedited review provision benefits plaintiffs by "provid[ing] speedy redress for violations of the Act." *Id.* at 695. The rapid review ensured by the combination of a 30-day filing deadline and mandatory expedition, moreover, limits any damage from erroneous municipal decisions. *Ibid.* The court also found it "significant" that Section 332(c)(7)(B)(v) "makes no provision for attorney's fees." *Id.* at 695.

Relying on those considerations, the Third Circuit also concluded that "[a]llowing plaintiffs to assert" Communications Act claims "under § 1983 would upset th[e] balance" that Congress established in the 1996 Act:

> A plaintiff would be freed of the short 30-day limitations period and would instead presumably have four years to commence the action. See 28 U.S.C. § 1658. The court would also presumably be freed of the obligation to hear the claim on an expedited basis. Perhaps most importantly, attorney's fees would be available.

286 F.3d at 694-695. The availability of attorney's fees would be particularly perverse, the Third Circuit stated, because Communications Act "plaintiffs are often large cor-

porations or affiliated entities, whereas [the] defendants are often small, rural municipalities." *Id.* at 695.

The Third Circuit explained that Section 332(c)(7) parallels the provisions this Court found sufficiently comprehensive to foreclose Section 1983 relief in *Sea Clammers* and *Smith* v. *Robinson*, 468 U.S. 992 (1984). Like Section 332(c)(7) here, the statutes in those cases "themselves provided for private judicial remedies, thereby evidencing congressional intent to supplant the § 1983 remedy." *Nextel*, 286 F.3d at 694 (quoting *Wright* v. *Roanoke Redevelopment & Housing Authority*, 479 U.S. 418, 427 (1987)). Conversely, the Third Circuit observed that Section 332(c)(7) differs from the provisions this Court found not to be comprehensive in *Blessing* and *Wright*, because the statutes in those cases, unlike Section 332(c)(7), provided no private judicial action to enforce statutory requirements. *Nextel*, 286 F.3d at 694-695.

Finally, the Third Circuit rejected the argument that a savings provision in the 1996 Act compelled the contrary result. That provision declares that "this Act * * * shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided." 47 U.S.C. § 152 (note). The Third Circuit observed: "We do not hold that enactment of the [1996 Act] had any effect on § 1983; we simply hold that the [1996 Act] itself did not create a right that can be asserted under § 1983 in lieu of the [1996 Act's] own remedial scheme." *Nextel*, 286 F.3d at 696.

B. In *Verizon Wireless*, *supra*, the Seventh Circuit reached the same result. In that case, the City of Mequon, Wisconsin, rejected Verizon's application to build a 70-foot antenna in a church yard. Although the Seventh Circuit concluded that the City of Mequon had violated 47 U.S.C. § 332(c)(7)(B)(iii)'s requirement that decisions be supported by "substantial evidence," the court rejected Verizon's claim for attorney's fees: "42 U.S.C. § 1983, which drags section 1988 in its wake, should not be fastened, barnacle-like, by judicial *Diktat*, to

this new federal statute that creates rights overlapped by the existing remedial statutes." 352 F.3d at 1153.

Section 1983, the Seventh Circuit also observed, was "enacted in recognition that civil rights suits normally pit individuals, often socially marginal, unpopular, and impecunious, against well-funded public officers." *Verizon Wireless*, 352 F.3d at 1152. In contrast, Communications Act suits are most often brought by companies with "the wherewithal to finance their own litigation without the boost given by fee-shifting statutes" and are often brought against "small towns, such as Mequon, population 21,000." *Ibid.*

C. In direct conflict with the Third and Seventh Circuits, the Ninth Circuit has now held that "Section 1983 remedies are available" for violations of 47 U.S.C. § 332(c)(7) "because the [Communications Act] does not contain a comprehensive remedial scheme." App., *infra*, 2a. The Ninth Circuit acknowledged that 47 U.S.C. § 332(c)(7)(B)(v) expressly "provides for a private right of action" "through which a plaintiff can redress [Communications Act] violations." App., *infra*, 5a-6a. But the Ninth Circuit dismissed that regime, characterizing it as "contain[ing] *procedural*, rather than *remedial*, provisions." App., *infra*, 9a. Acknowledging the circuit conflict it was creating, the Ninth Circuit declared: "[W]e depart from the Third Circuit and hold that Congress did not impliedly foreclose § 1983's remedial provisions." *Id.* at 9a; see p.10 n.5, *supra*.

The Ninth Circuit also rejected the reasoning that led the Third and Seventh Circuits to reach the opposite result. While the Third and Seventh Circuits agreed that the Communications Act cause of action for expedited judicial review, 47 U.S.C. § 332(c)(7)(B)(v), is remedial, see *Nextel*, 286 F.3d at 694; *Verizon Wireless*, 352 F.3d at 1152-1153, the Ninth Circuit deemed that cause of action insufficiently beneficial to plaintiffs to qualify as "remedial." App., *infra*, 6a. The cause of action is "hollow," the Ninth Circuit stated, because "[t]he only benefit to an aggrieved plaintiff is expedited

judicial review." App., *infra*, 8a. "[A]n expedited decision does nothing to remedy a [Communications Act] violation in itself," the court added. *Id.* at 8a-9a; see *id.* at 8a (The "provisions are not remedial."). Similarly, the Ninth Circuit declined to consider the 30-day limitations period in Section 332(c)(7)(B)(v) when addressing comprehensiveness. "Shortening the limitations period to thirty days imposes a burden on an aggrieved plaintiff, not a benefit." *Id.* at 8a.

The Ninth Circuit also rejected the Third Circuit's conclusion that Section 1983 remedies are incompatible with—and would upset the balance established by—Section 332(c)(7)'s remedial scheme. In *Nextel*, the Third Circuit held that allowing Section 1983 actions to proceed under a four-year limitations period would be inconsistent with the express 30-day limit provided by 47 U.S.C. § 332(c)(7)(B)(v). See 286 F.3d at 694-695. In this case, by contrast, the Ninth Circuit held that those limitations periods are "compatible" because a plaintiff could (if it chose to) comply with both. App., *infra*, 9a. Furthermore, unlike the Third and Seventh Circuits, the Ninth Circuit saw no problem with awarding attorney's fees under Section 1988 for Communications Act violations despite Congress's failure to authorize that remedy in the Communications Act itself. *Verizon Wireless*, 352 F.3d at 1152-1153; see *Nextel*, 286 F.3d at 694.

Those disagreements reflect not only divergent understandings of the Communications Act, but also a deeper conflict over this Court's *Sea Clammers* decision and its progeny. The Third Circuit and other courts have observed that one critical distinction between the remedial schemes this Court has found sufficiently "comprehensive" to foreclose Section 1983 relief, and those the Court has found insufficient, is that the former provide a private right of action for judicial enforcement. See p. 16, *supra*; *Kendall* v. *City of Chesapeake*, 174 F.3d 437, 440-443 (4th Cir. 1999) ("[T]he Supreme Court has repeatedly emphasized that the availability of" private judicial remedies "strongly suggests a Congressional intent to preclude resort to § 1983."). Likewise, the Third Circuit concluded that Congress's decision to limit a statutory right of action (whether through a short limitations period or restrictions on available relief) may demonstrate an intent to foreclose the more capacious remedies of Sections 1983 and 1988. See *Nextel*, 286 F.3d at 694-695. Here, the Ninth Circuit drew precisely the opposite inference, holding that Congress's decision to limit relief under an express cause of action (such as through "the lack of any damages" remedy) is "evidence that Congress * * * intended to preserve an aggrieved plaintiff's right to invoke § 1983." App., *infra*, 7a.

Finally, the Ninth Circuit's construction of the 1996 Act's savings clause, 47 U.S.C. § 152 (note), is flatly inconsistent with the Third Circuit's construction. The Ninth Circuit held that Congress, in directing that the 1996 Act "shall not be construed to modify, impair, or supersede Federal, state, or local law" except as expressly provided, had "actually affirmed its * * * intent" to make Section 1983 remedies available. App., *infra*, 10a. In so holding, the Ninth Circuit followed the Eleventh Circuit's vacated decision in *AT&T Wireless PCS, Inc.*, 210 F.3d at 1328-1330. The Third Circuit's decision in *Nextel* expressly "disagree[d] with the reasoning of that decision," holding that the unavailability of Section 1983 relief for Communications Act violations does not "impair" Section 1983. 286 F.3d at 695. It merely recognizes that Congress, in amending the Communications Act in 1996, declined to modify Section 1983's scope by creating *additional* rights that can be asserted under it. *Id.* at 696.

D. The same conflict pervades the decisions of the federal district courts as well. In case after case, district courts have agreed with the Third and Seventh Circuits, holding that Section 1983 damages and Section 1988 fees are not available for violations of 47 U.S.C. § 332(c)(7). See, *e.g.*, *Nextel Communications, Inc.* v. *Town of Randolph*, 193 F. Supp. 2d 311, 322 (D. Mass. 2002); *National Telecomm. Advisors, Inc.* v. *City of Chicopee*, 16 F. Supp. 2d 117, 122-123 (D. Mass.

1998); *CIS Communications L.L.C.* v. *County of Jefferson, Missouri*, 222 F. Supp. 2d 1148, 1150 (E.D. Mo. 2002); *Sprint Spectrum, L.P.* v. *Town of Ogunquit*, 175 F. Supp. 2d 77, 94 (D. Me. 2001); *AT&T Wireless PCS, Inc.* v. *City of Atlanta*, 50 F. Supp. 2d 1352, 1362 (N.D. Ga. 1999).

In case after case, other district courts have reached the opposite result. *Nextel Partners, Inc.* v. *Town of Amherst*, 251 F. Supp. 2d 1187, 1199 (W.D.N.Y. 2003); *Omnipoint* v. *Town of Westford*, 206 F. Supp. 2d 166, 173-174 (D. Mass. 2002); *APT Minneapolis Inc.* v. *Stillwater Township*, 2001 WL 1640069, at *14 (D. Minn. June 22, 2001); *SBA Communications, Inc.* v. *Town of Brookfield*, 96 F. Supp. 2d 139, 142 (D. Conn. 2000); *Smart SMR of N.Y., Inc.* v. *Zoning Comm'n of the Town of Stratford*, 995 F. Supp. 52, 61 (D. Conn. 1998); *Cellco Partnership* v. *Town Plan and Zoning Comm'n of the Town of Farmington*, 3 F. Supp. 2d 178, 186 (D. Conn. 1998); *Sprint Spectrum, L.P.* v. *Town of Easton*, 982 F. Supp. 47, 53 (D. Mass. 1997). This Court's intervention is necessary to resolve this pervasive conflict among the circuits and the district courts.

II. The Ninth Circuit's Decision Departs From This Court's Precedents And Disrupts The Careful Balance Established By The Communications Act

Under *Sea Clammers*, Congress's provision of a comprehensive remedial regime for vindicating statutory interests may "demonstrate congressional intent to preclude the remedy of suits under § 1983." 453 U.S. at 20. In assessing the remedial regime, "[t]he crucial consideration is what Congress intended," as indicated by the statute's text, structure, and purpose. *Smith* v. *Robinson*, 468 U.S. at 1012. In this case, those indicia demonstrate that Congress "provided precisely the remedies it considered appropriate." 453 U.S. at 14. Only by inverting this Court's precedents did the Ninth Circuit reach the contrary conclusion.

A. It is undisputed that the Communications Act provides an express, expedited cause of action "through which a plaintiff can redress * * * violations" of Section 332(c)(7)'s requirements. App., *infra*, 5a-6a (citing 47 U.S.C. § 332(c)(7)(B)(v)). That fact alone suggests an intent to displace Section 1983 remedies. As this Court observed, the statutes in *Sea Clammers* and *Smith* v. *Robinson* "provided for private judicial remedies, thereby evidencing congressional intent to supplant the § 1983 remedy." *Wright*, 479 U.S. at 427. The Communications Act does likewise here.

The cause of action created by Section 332(c)(7)(B)(v), moreover, forms part of the Communication Act's comprehensive regulatory regime. In provision after provision of the Act, Congress specified both the legal duty imposed and the appropriate governmental and private remedies. See, *e.g.*, 47 U.S.C. § 202(c) (penalty for common carriers' unjust or unreasonable discrimination in charges and practices); 47 U.S.C. § 203(e) (penalty for tariff violations); 47 U.S.C. § 205 (penalty for violation of rate orders); 47 U.S.C. §§ 206-207 (private action for damages and attorney's fees for persons injured by common carrier violations of Chapter 2); 47 U.S.C. § 227(b)(1)(C), (3) (prohibition on certain uses of telephone, with private action for injunctive relief, actual damages, statutory damages, and treble damages in specified circumstances); 47 U.S.C. § 231 (fines and civil penalties, but no private action, for violations of internet minor-access restrictions); 47 U.S.C. § 605(e)(3) (private action for unlawful interception of communications, including injunctions, damages computed under statutory criteria, and "reasonable attorneys' fees"). The 1996 amendments to the Act follow the same deliberate pattern. See, *e.g.*, 47 U.S.C. § 258 (prohibiting changes to telephone service provider absent verification procedures and providing damages to the disconnected carrier "in an amount equal to all charges paid by such subscriber after such violation"); 47 U.S.C. § 274 (authorizing damages action or complaint to the Commission for violations of electronic publishing restrictions).

As this Court recognized in *Sea Clammers*, the presence of such an "elaborate" enforcement regime indicates that Congress "provided precisely the remedies it considered appropriate" and "supplant[ed] any remedy that otherwise would be available under § 1983." 453 U.S. at 14-15, 20-21. Simply put, where Congress intended to award relief such as attorney's fees for Communications Act violations, Congress provided that relief in the Communications Act itself.

B. To reach the opposite result, the Ninth Circuit declared that Section 332(c)(7)(B)(v) is not even "remedial" under *Sea Clammers* because, according to that court, it "does not provide for any type of relief." App., *infra*, 7a, 8a; see *id.* at 7a (Act "contains no remedies at all."); *id.* at 9a ("no remedial provisions"); *ibid.* ("[T]he statute grants no remedies beyond procedural rights."). The notion that Congress, in enacting Section 332(c)(7)(B)(v), established a cause of action that affords successful plaintiffs "no remedies at all" borders on the absurd. Congress designed that provision to "provide[] a mechanism for *judicial relief*." H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 208 (1996) (emphasis added). Every other court to have considered the matter has concluded that 47 U.S.C. § 332(c)(7)(B)(v) does authorize remedies, including (at a minimum) injunctive relief. *Nextel*, 286 F.3d at 695 & n.6 (citing district court cases). To be sure, Section 332(c)(7)(B)(v) does not *enumerate* the available remedies. However, as this Court explained in *Franklin* v. *Gwinnett County Public Schools*, federal courts adjudicating claims under statutes that create a cause of action but are silent about remedies are presumed to "have the power to award any appropriate relief." 503 U.S. 60, 70-71 (1992); see *Nextel*, 286 F.3d at 695 n.6. The Ninth Circuit offered no reason for departing from that holding.

Perhaps recognizing as much, the Ninth Circuit declared that Congress, by limiting the express private remedies in the Communications Act, somehow demonstrated its intent to preserve the more capacious remedies of Section 1983.

"[T]he lack of any damages" under the Communications Act, the Ninth Circuit thus stated, is evidence "that Congress intended to preserve an aggrieved plaintiff's right to invoke § 1983." App., *infra*, 7a. That strained reasoning defies *Sea Clammers*, which held that Section 1983 remedies were unavailable there despite the absence of statutory damages relief. 453 U.S. at 14, 17; App., *infra*, 7a-8a.

The Ninth Circuit's reasoning, in fact, turns *Sea Clammers* and its progeny on their heads. Those cases recognize that Congress's decision to impose limits on express statutory remedies, far from evidencing an intent to preserve Section 1983 remedies, ordinarily precludes efforts to circumvent the limits through suit under Section 1983:

> [W]hen "a state official is alleged to have violated a federal statute which provides its own comprehensive enforcement scheme, the requirements of that enforcement procedure may not be bypassed by bringing suit directly under § 1983."

453 U.S. at 20 (quoting *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 673 n.2 (1979) (Stewart, J., dissenting)). As the Court observed in *Smith* v. *Robinson*, *Sea Clammers* supports the "proposition that when a statute creates a comprehensive remedial scheme, intentional 'omissions' from that scheme should not be supplanted by the remedial apparatus of Section 1983." 468 U.S. at 1003; see *Great American Fed. Sav. & Loan Ass'n* v. *Novotny*, 442 U.S. 366, 376 (1978) (holding that Title VII violations cannot be asserted under 42 U.S.C. § 1985 because, among other things, the otherwise "short and precise time limitations of Title VII would be grossly altered"); *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 74-75 (1996) (statutory scheme with "modest set of sanctions" evinces intent to foreclose alternative cause of action that "would expose th[e] official to the full remedial powers of a federal court."). Under the Ninth Circuit's twisted logic, Congress's decision *not* to provide a

damages remedy in an underlying statute evidences Congress's intent to provide *both* damages and attorney's fees.

C. In this case, moreover, the Ninth Circuit's decision to engraft Section 1983's remedial apparatus onto Section 332(c)(7) permits the sort of procedural bypass this Court has prohibited. The Communications Act provides a streamlined procedure for resolving wireless facility siting disputes, combining a relatively short 30-day limitations period with expedited judicial review. That streamlined review serves the 1996 Act's goal of ensuring "rapid deployment of new telecommunications technologies," and minimizing delays that might otherwise harm the public interest. 1996 Act, 110 Stat. 56. The Ninth Circuit's decision to allow tower-siting claims to be asserted under Section 1983—without required expedition and subject to a four-year limitations period, see 28 U.S.C. § 1658; *Jones* v. *R.R. Donnelley & Sons Co.*, 124 S. Ct. 1836, 1845 (2004)—fatally undermines that carefully crafted scheme. As the Third Circuit observed, allowing suit under Section 1983 would "free" plaintiffs "of the short 30-day limitations period," offering them "four years to commence the action" while accumulating damages at public expense. 286 F.3d at 695. It would "free" the courts "of the obligation to hear the claim on an expedited basis." *Ibid.* And it would make "attorney's fees * * * available," even though Congress did not provide such relief in the Communications Act. *Ibid.*

The Ninth Circuit's conclusion that Congress intended to impose the heavy sanctions of damages and attorney's fees on municipalities for their zoning decisions is also contrary to Section 332(c)(7)'s title, "Preservation of local zoning authority." That conclusion, moreover, is at odds with the Communications Act's establishment of a broad right of action for "adversely affected person[s]," its short limitations period, and mandatory expedition, features that evidence Congress's desire to promote the public interest by balancing the Act's dual objectives of rapid deployment of wireless technology

and the preservation of local authority. See *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 14 (1942) (provision allowing suit by "adversely affected" persons affords private litigants standing "as representatives of the public interest"). By enacting Section 332(c)(7), Congress interjected federal law into an area—zoning—that is the traditional domain of state and local governments. If Congress had meant to impose expansive financial liability in that sensitive area, it would have so provided expressly.

D. Finally, the Ninth Circuit's analysis of the savings provision of the 1996 Act, App., *infra*, 10a, exhibits a similar disregard for this Court's *Sea Clammers* decision. As the Ninth Circuit recognized, *Sea Clammers* rejected a virtually indistinguishable construction of similar language. See App., *infra*, 11a-12a; 453 U.S. at 15-16. The statutory provisions at issue there preserved the right under "any statute or common law to seek enforcement * * * or to seek any other relief." 453 U.S. at 7 nn.10 & 11; App., *infra*, 11a. This Court held that those savings clauses preserved the right to enforce the substantive rights created by other statutes, but not the right to enforce, via Section 1983, rights created by the statute containing the savings clause. 453 U.S. at 14-15.

Attempting to distinguish that decision, the Ninth Circuit urged that the 1996 Act's savings provision is broader than those at issue in *Sea Clammers* because the former "forbids the impairment of any federal 'law,'" while the latter prevented the impairment of "any 'right.'" App., *infra*, 12a. It is difficult to see how that distinction could make a difference. The savings clauses at issue in *Sea Clammers* preserved the right, under other statutes, "to seek enforcement" or "relief." If that reservation did not "save" the right to seek enforcement or relief under Section 1983, the rule against implied "impairment" of other "laws" in the Communications Act does not either. Besides, Congress did not "impair" Section 1983 by declining to make provisions added by the 1996 Act actionable under it. Congress simply

declined to expand Section 1983's sweep to include a new class of cases. See p. 16, *supra*.

III. This Case Presents A Recurring Issue Of National Importance

Whether Section 1983 damages and thus Section 1988 fees are available for Communications Act violations is a recurring question of pressing importance. Myriad courts have addressed that issue already, see pp. 19-20, *supra*, and the torrent of cases alleging violations of 47 U.S.C. § 332(c)(7) ensures that the issue will persist, particularly now that the Ninth Circuit has held that damages and fees under Sections 1983 and 1988 are available.

"The federal courts now routinely hear cases brought under the [Communications Act] by those who wish to construct cellular antenna towers and have been denied permission to do so * * *." *National Tower, LLC* v. *Plainville Zoning Board of Appeals*, 297 F.3d 14, 17 (1st Cir. 2002); see S. Martin, *Communications Tower Sitings*, 12 Berk. Tech. L.J. 483, 484 (1997) (Section 332(c)(7) "continues to create rancor and litigation."). The subject is "well traversed," *Omnipoint Holdings*, 206 F. Supp. 2d at 167, and the federal courts are awash with Section 332(c)(7) disputes.[7]

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[7] See, *e.g.*, *Nextel Communications* v. *Town of Hansen*, 2004 WL 626556 (D. Mass. Mar. 26, 2004); *APT Minneapolis Inc.* v. *City of Maplewood*, 1998 WL 634224 (D. Minn. Aug. 12, 1998); *Century Cellunet, Inc.* v. *City of Ferrysburg*, 993 F. Supp. 1072 (W.D. Mich. 1997); *Primeco PCS v. Lake County*, 1998 WL 565036 (M.D. Fla. July 20, 1998); *Sprint Spectrum L.P.* v. *Jefferson County*, 968 F. Supp. 1457 (N.D. Ala. 1997); *BellSouth Mobility, Inc.* v. *Gwinnett County*, 944 F. Supp. 923 (N.D. Ga. 1996); *AT&T Wireless Servs.* v. *Orange County*, 982 F. Supp. 856 (M.D. Fla. 1997); *Omnipoint* v. *Town of Lincoln*, 107 F. Supp. 2d 108 (D. Mass. 2000); *National Tower LLC* v. *Frey*, 164 F. Supp. 2d 185 (D. Mass. 2001), *aff'd* 297 F.3d 14 (1st Cir. 2002); *Cellular Tel. Co.* v. *Zoning Bd. of the Borough of Ho-Ho-Kus*, 24 F. Supp. 2d 359 (D.N.J. 1998), *aff'd in part, rev'd in part*, 197 F.3d 64 (3d Cir. 1999); *Virginia Metronet, Inc.* v. *Board of Supervisors of James County*, 984 F. Supp. 966 (E.D. Va. 1998); *Omnipoint Corp.* v. *Zoning Hearing Bd. of Pine Grove Township*, 20 F. Supp. 2d 875 (E.D. Pa. 1998), *aff'd* 181 F.3d 403 (3d Cir. 1999); *Illinois RSA No. 3* v. *County of Peoria*, 963 F. Supp. 732 (C.D. Ill. 1997); *Aegerter v. City of Delafield*, 174 F.3d 886 (7th Cir. 1999); *Town of Amherst* v. *Omnipoint Enterps., Inc.*, 173 F.3d 9 (1st Cir. 1999); *Sprint Spectrum L.P.* v. *Willoth*, 176 F.3d 630 (2d Cir. 1999); *Sprint Spectrum L.P.* v. *City of Carmel*, 361 F.3d 998 (7th Cir. 2004).

That proliferation of cases is likely to continue unabated, for at least three reasons. First, geographic expansion of the Nation's wireless networks, the entry of new providers, and increasing wireless telephone usage, all ensure a steady demand for new antenna towers and related facilities, even in areas already served by numerous providers. See J. Van, *Wireless Phones Try to Connect in High Places*, Chicago Tribune, Jan. 17, 2004 (*avail.* 2004 WL 65042704). Second, the low threshold for claiming a violation of 47 U.S.C. § 332(c)(7) ensures that many antenna tower siting disputes will end up in court. Section 332(c)(7) makes zoning decisions that were once primarily a matter of state law subject to challenge under a panoply of federal standards: decisions may not "unreasonably discriminate" among service providers, 47 U.S.C. § 332(c)(7)(B)(i)(I); cannot "prohibit or have the effect of prohibiting the provision of personal wireless services," 47 U.S.C. § 332(c)(7)(B)(i)(II); must be issued within a reasonable period of time," 47 U.S.C. § 332(c)(7)(B)(ii); must be "in writing and supported by substantial evidence," 47 U.S.C. § 332(c)(7)(B)(iii); and may not consider "the environmental effects of radio frequency emissions," 47 U.S.C. § 332(c)(7)(B)(iv). Consequently, virtually every antenna siting decision has the potential to become, quite literally, a federal case.

Third, even apart from the number of siting decisions and the scope of the federal standards, Section 332(c)(7) "fairly bristles with potential issues," *Cellular Tel. Co.* v. *Town of Oyster Bay*, 166 F.3d 490, 494 (2d Cir. 1999), ensuring

further litigation.[8] And the lure of damages and attorney's fees, as well as the ability to avoid the Communications Act's short limitations period, all but guarantee that the resulting lawsuits will, absent this Court's intervention, include Section 1983 claims with increasing frequency.[9]

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[8] For example, federal courts are grappling with whether the requirement of a "decision . . . in writing" mandates not merely a written resolution but a written explanation for the result. See *AT&T Wireless PCS, Inc.* v. *City Council of Virginia Beach*, 155 F.3d 423, 429-430 (4th Cir. 1998); *Primeco PCS* v. *Village of Fox Lake*, 26 F. Supp. 2d 1052 (N.D. Ill. 1998). There are disputes over the extent to which "[a]esthetic concerns may be a valid basis for denial of a permit." *Preferred Sites, LLC* v. *Troup County*, 296 F.3d 1210, 1219 (11th Cir. 2002); see *Oyster Bay*, 166 F.3d at 495. Other issues abound. See, *e.g.*, *Sprint Spectrum, L.P.* v. *Mills*, 283 F.3d 404 (2d Cir. 2002) (what constitutes "regulation" of wireless facilities); *American Towers* v. *Williams*, 146 F. Supp. 2d 27, 34-36 (D.D.C. 2001) (whether disputes concerning towers designed to perform both wireless telephone and other functions are reviewable under 42 U.S.C. § 332(c)(7)), *aff'd* 50 Fed. Appx. 448 (D.C. Cir. 2002). And many determinations under the Act are legally and factually complex. See *Willoth*, 176 F.3d at 641 (Determining whether the service qualifies as "personal wireless service" requires "a detailed parsing of the statutory language, including layers of highly technical definitions."); *Aegerter*, 174 F.3d at 891 (whether services are "functionally equivalent"). Many similar issues arose in this litigation. Admin. Rec. 793 (whether respondent's service is "personal wireless service" covered by Section 332(c)(7)); App., *infra*, 24a (whether aesthetic concerns can constitute "substantial evidence"); *id.* at 30a (whether "substantial evidence" requires rationale to appear in the written decision or merely in the record); *id.* at 18a-20a (burdens of proof). Those disputes, moreover, may represent the tip of the iceberg. See p. 26 n.7, *supra* (additional district court cases).

[9] Disputes over the availability of Section 1983 actions and thus attorney's fees for Communications Act violations, moreover, are hardly limited to the context of 47 U.S.C. § 332(c)(7). The federal courts are also confronting the issue in other contexts, including suits against state public utility commissioners for allegedly violating 47 U.S.C. § 251's requirements, see *Verizon Maryland Inc.* v. *RCN Telecom Servs., Inc.*, 232 F. Supp. 2d 539, 557 (D. Md. 2002) (rejecting Section 1983 claim because the "1996 Act provides ample—and sufficiently comprehensive—means for vindicating the right at issue"), or for approving mergers that allegedly contravene the Act, see *MCI Telecomm. Corp. v. SNET*, 27 F. Supp. 2d 326, 334 (D. Conn. 1998) (permitting Section 1983 action). Still other

That portends serious consequences for localities across the Nation as they struggle to reconcile local zoning goals with the requirements of federal law. Because "municipalities do not enjoy immunity from suit—either absolute or qualified—under § 1983," *Leatherman* v. *TCNICU*, 507 U.S. 163, 166 (1993), the Ninth Circuit's decision threatens to impose potentially crippling liability on local governments for even their good-faith exercises of day-to-day zoning authority. Given the legal uncertainty and complexity of this area, see pp. 27-28 & n.8, *supra*, innocent mistakes are inevitable. That is particularly true for smaller localities. See *Nextel*, 286 F.3d at 695 (noting that "defendants are often small, rural municipalities" with "little familiarity with" the Communications Act); *City of Atlanta*, 50 F. Supp. 2d at 1361 ("[T]here will be some zoning authorities, perhaps less sophisticated and with fewer legal resources * * * who may stumble, albeit in an earnest attempt to comply.").

Already stretched thin by lagging revenues and the expanding demands of protecting their citizens, local governments can ill-afford that new and unexpected financial burden. See, *e.g.*, F. Hinchey, *Some Towns Struggling to Light Up The Night Sky*, Columbus Dispatch, June 29, 2003, at D01 (noting budget concerns, including "flat tax collections, and, in many cases, increased costs for homeland security"). A single erroneous zoning decision may cost the smallest of towns hundreds of thousands of dollars, potentially at the expense of basic governmental services. Because the plaintiffs under Section 332(c)(7) are typically large telecommunications companies with both the inclination and the resources to litigate these disputes thoroughly, the potential liability is significant. As Judge Carnes recently noted:

Section 1983 suits have been brought claiming violations of 47 U.S.C. § 253. See, *e.g.*, *Qwest Corp.* v. *City of Santa Fe*, 224 F. Supp. 2d 1305, 1315 (D.N.M. 2002) (rejecting Section 1983 action); *Sprint PCS* v. *County of San Diego*, 2004 WL 718424, at *10-*16 (rejecting *Qwest* and allowing Section 1983 action).

> [C]orporations like AT&T Wireless [do not] need reimbursement of attorney fees to make it financially feasible for them to challenge in court regulatory denials that cost them money. Their financial self-interest and the vast sums at stake make them more than happy to * * * to enforce the legislative measures that they have lobbied through Congress * * * .

AT&T Wireless, 210 F.3d at 1330 (concurring opinion).[10]

Equally troubling, municipalities concerned about potential liability may shrink from meaningfully overseeing the placement of wireless communications towers. Many communities simply lack sufficient resources to risk damages and attorney's fees, forcing them to err on the side of granting even questionable requests so as to avoid potential litigation and liability.[11] The resulting overdeterrence would be inconsistent with Congress's stated objective in Section 332(c)(7) to preserve local zoning authority. It would also produce a patchwork of antenna towers sited with little regard to legitimate zoning and planning requirements. Those effects are likely to be enduring, because commercial towers and antennae are rarely removed once approved and erected. See Martin, *supra*, at 501. This Court's review is necessary to prevent those potentially irreversible consequences.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[10] Judge Carnes noted the irony of allowing telecommunications giants to seek money from small municipalities under a civil rights statute: "Section 1988 was intended to help the civil rights Davids of the world do battle with governmental Goliaths. [Plaintiff] AT&T Wireless is a seven-billion dollar multi-national corporation. My, how the Davids have grown." 210 F.3d at 1330.

[11] Cf. H. Heineman, *Council to Review Antenna Ordinance*, Santa Monica Mirror, Feb. 18, 2004 (reporting that company responded to tower zoning proposal by "ask[ing] City officials if they 'have considered the budget the City Council wants to allocate for litigation'").

Respectfully submitted,

CAROL W. LYNCH
City Attorney
City of Rancho Palos Verdes
ROCHELLE R. BROWNE
T. PETER PIERCE
RICHARDS, WATSON & GERSHON, P.C.
355 So. Grand Ave.
40th Floor
Los Angeles, CA 90071-3101
(213) 626-8484

JEFFREY A. LAMKEN
Counsel of Record
MARK T. STANCIL
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., NW
Washington, D.C. 20004-2400
(202) 639-7700

May 25, 2004

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-55681
Argued and Submitted: Aug. 7, 2003
Filed: Jan. 15, 2004

MARK J. ABRAMS,
Plaintiff-Appellant,

v.

CITY OF RANCHO PALOS VERDES, A MUNICIPALITY; CITY OF RANCHO PALOS VERDES CITY COUNCIL,
Defendants-Appellees,

AND

FRANK LYON; JON CARTWRIGHT; THOMAS LONG; CRAIG MUELLER; THEODORE PAULSON; DONALD VANNORSDALL; JOHN MCTAGGART; DOUGLAS W. STERN; LEE BYRD; BARBARA FERRARO; MARILYN LYON; AND LARRY CLARK,
Defendants.

Appeal from the United States District
Court for the Central District of California
Stephen V. Wilson, District Judge, Presiding.
D.C. No. CV-00-09071-SVW

Before: KOZINSKI and T.G. NELSON, Circuit Judges, and JANE A. RESTANI,* Judge.

T.G. NELSON, Circuit Judge.

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* The Honorable Jane A. Restani, Judge, United States Court of International Trade, sitting by designation.

Mark J. Abrams appeals the district court's denial of § 1983[1] damages. The district court found that the City of Rancho Palos Verdes ("City") violated Abrams' rights under the Telecommunications Act of 1996 ("TCA"). Nonetheless, the court concluded that Congress intended the TCA to provide a comprehensive remedial scheme, thus barring additional remedies under § 1983. We disagree. Section 1983 remedies are available because the TCA does not contain a comprehensive remedial scheme. Therefore, we reverse and remand to the district court.

I. BACKGROUND

Abrams is a Federal Communication Commission ("FCC") licensed, amateur radio operator. He also provides commercial, mobile radio services (otherwise known as personal wireless services) from his home. In 1989, the City issued Abrams a permit to construct an antenna on his property for his amateur use.[2] Abrams used his antenna for both amateur and commercial purposes.

Ten years later, the City learned of Abrams' unauthorized commercial use. The City obtained an injunction preventing Abrams from using his antenna for commercial purposes until he obtained a conditional use permit ("CUP"). However, when Abrams applied for the CUP, the City denied it.

Abrams filed the present action, claiming that the City violated his rights under the TCA. Invoking § 1983, Abrams sought declaratory relief, injunctive relief, damages, attorney's fees, and costs. The district court agreed with Abrams and found that the City did not have a valid reason to deny Abrams a CUP, and ordered the City to grant Abrams' permit. However, the district court concluded that the TCA

[1] 42 U.S.C. § 1983.

[2] Although the City's policy limits antennas to a height of 40 feet, the inspector approved Abrams' plan to build a 52.5–foot antenna.

subsumed all of Abrams' remedies. Thus, the court declined his request for damages, attorney's fees, and costs. Abrams appealed.

II. ANALYSIS

The parties do not dispute the facts in this case. Therefore, the only question before us is whether the TCA contains a comprehensive remedial scheme, evincing Congress's intent to preclude remedies under § 1983.[3] The Ninth Circuit has never answered this question.

We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo the district court's statutory interpretation of § 1983 and the TCA.[4]

A. *Section 1983*

Section 1983 is a remedial provision. It provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .[5]

To obtain remedies pursuant to § 1983, a plaintiff must first establish a federal "right."[6] Once a plaintiff satisfies the initial burden of proving he has a federal statutory right, he creates a rebuttable presumption that he is entitled to § 1983

[3] Abrams has conceded all state-law claims that he initially raised in this appeal.

[4] *Sea–Land Serv., Inc. v. Lozen Intern.*, 285 F.3d 808, 813 (9th Cir. 2002).

[5] 42 U.S.C. § 1983.

[6] *Blessing v. Freestone*, 520 U.S. 329, 340, 117 S. Ct. 1353, 137 L. Ed. 2d 569 (1997).

remedies.[7] The parties do not dispute the fact that the TCA clearly grants enforceable "rights."[8] Thus, the only question in this case is whether the City can rebut the presumption that Congress intended § 1983 remedies to be available for TCA violations.

The City can rebut the presumption in favor of § 1983 remedies if it can prove that Congress either expressly or impliedly foreclosed § 1983 remedies.[9] The TCA's language provides no support for the theory that Congress expressly foreclosed § 1983. Thus, the question further narrows to whether Congress impliedly foreclosed § 1983 remedies.

Congress impliedly forecloses § 1983 remedies when it "creat[es] a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983."[10] However, the existence of administrative mechanisms to safeguard an individual's interests does not evince the requisite congressional intent.[11] In other words, it is not enough that Congress provides procedures by which a plaintiff can enforce his rights under a statute.[12] The City must prove that through the remedies Congress provided in the TCA, it

[7] *Id.* at 341, 117 S. Ct. 1353.

[8] *Id.* at 340–41, 117 S. Ct. 1353.

[9] *Id.* at 341, 117 S. Ct. 1353.

[10] *Id.*

[11] *Id.* at 347, 117 S. Ct. 1353.

[12] *See Wright v. City of Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 424, 107 S. Ct. 766, 93 L. Ed. 2d 781 (1987) (holding that "the administrative scheme of enforcement" did not foreclose other remedies); *id.* at 425, 107 S. Ct. 766 (requiring remedial scheme "to raise a clear inference that Congress intended to foreclose a § 1983 cause of action"); *id.* at 427, 107 S. Ct. 766 (distinguishing cases involving other statutes that provide private judicial remedies, evincing congressional intent to foreclose § 1983 remedies).

intended to "close the door on § 1983 liability."[13] We hold that the City has not met this burden.

B. *The TCA*

Congress enacted the TCA to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[14] The TCA requires that state and local governments support any denial of "a request to place, construct, or modify personal wireless service facilities . . . in writing . . . [with] substantial evidence contained in a written record."[15] The TCA also provides that:

> Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government . . . may petition the Commission for relief.[16]

Thus, the TCA does not explicitly provide for any types of remedies such as damages, injunctions, attorney's fees, or costs. Rather, the TCA only provides a short statute of limitations (30 days), expedited judicial review, and avenues through which a plaintiff can redress TCA violations (an

[13] *Blessing*, 520 U.S. at 348, 117 S. Ct. 1353; *see also Wright*, 479 U.S. at 423–24, 107 S. Ct. 766 ("We do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for the deprivation of a federally secured right." (internal quotation marks omitted)).

[14] Pub. L. No. 104-104, 110 Stat. 56 (1996).

[15] 47 U.S.C. § 332(c)(7)(B)(iii).

[16] *Id.* § 332(c)(7)(B)(v).

action in any court of competent jurisdiction and permissive ability to petition the Commission). The question is whether the TCA's provisions are so comprehensive that they close the door on § 1983 liability.

C. *The TCA Does Not Contain a Comprehensive Remedial Scheme*

In the case before us, the TCA provides for a private right of action by allowing aggrieved plaintiffs the right to bring an action in any court of competent jurisdiction, and before the Commission. However, the statute grants no remedies beyond procedural rights. The procedural provisions are insufficient for us to conclude that the TCA contains a comprehensive remedial scheme that closes the door on § 1983 liability.

The cases in which courts have found that Congress implied its intent to foreclose resort to § 1983 remedies presented remedial schemes more comprehensive than, and thus distinguishable from, the TCA. In *Middlesex County Sewerage Authority v. National Sea Clammers Association*,[17] the Supreme Court held that Congress impliedly foreclosed § 1983 remedies because the two rights-creating statutes at issue had "unusually elaborate enforcement provisions."[18] The statutes permitted civil penalties,[19] litigation costs,[20] injunctive relief,[21] and suspensions or revocations.[22] Therefore, the Court concluded that "Congress provided precisely

[17] 453 U.S. 1, 101 S. Ct. 2615, 69 L. Ed. 2d 435 (1981).

[18] *Id.* at 13, 101 S. Ct. 2615.

[19] 33 U.S.C. § 1415(d).

[20] 33 U.S.C. § 1365(d).

[21] 33 U.S.C. § 1415(d).

[22] 33 U.S.C. § 1415(f).

the remedies it considered appropriate" and refused to read more into it.[23]

In *Department of Education v. Katherine D.*,[24] we held that the underlying statute was sufficiently comprehensive so as to evince Congress's intent to foreclose § 1983 remedies. The underlying statute established an elaborate procedural scheme and provided the reviewing court with authority to grant appropriate relief.[25] This court held that the rights granting statute's "complex provisions . . . create a comprehensive and exclusive remedial scheme that precludes reliance upon a cause of action under section 1983."[26]

The TCA differs from both the statutes in *Sea Clammers* and the statute in *Katherine D.* because the TCA does not provide for any type of relief. While one may argue that the lack of any damages in the TCA is evidence that Congress impliedly intended to foreclose damages, a better justification for the absence of a remedial provision is that Congress intended to preserve an aggrieved plaintiff's right to invoke § 1983. An implied preservation is consistent with the presumption in favor of § 1983 remedies.[27] Thus, in this case, where the TCA contains no remedies at all, we must

[23] *Sea Clammers*, 453 U.S. at 15, 101 S. Ct. 2615.

[24] 727 F.2d 809 (9th Cir. 1983).

[25] 20 U.S.C. § 1415(l)(2), (3).

[26] *Katherine D.*, 727 F.2d at 820.

[27] *Buckley v. City of Redding*, 66 F.3d 188, 192–193 (9th Cir. 1995). In *Buckley*, we held that an enforcement mechanism was insufficient to overcome the presumption for § 1983 remedies. *Id.* at 193. The court said: "To preclude enforcement under section 1983, the Act's remedial scheme must be so comprehensive as to leave no room for additional private remedies." *Id.* at 192–93 (citing *Suter v. Artist M.*, 503 U.S. 347, 360 n. 11, 112 S. Ct. 1360, 118 L. Ed. 2d 1 (1992)). Our language leaves room for a statute to provide some private remedies without entirely foreclosing § 1983 remedies.

conclude that Congress did not intend to foreclose § 1983 remedies.

When faced with the same question before us, the Third Circuit in *Nextel Partners Inc. v. Kingston Township*[28] held that the TCA was incompatible with § 1983 and thus foreclosed its remedies.[29] The *Nextel* court concluded that the TCA contained a comprehensive remedial scheme because of its short statute of limitations, expedited review, and judicial jurisdictional provisions.[30] The court also concluded that § 1983 and the TCA were incompatible because § 1983 permits attorney's fees, whereas the TCA does not.[31] Moreover, § 1983 has a longer limitations period and does not contain any provision for expeditious reviews.[32] Thus, the Third Circuit concluded that § 1983 remedies could not be granted without upsetting the TCA's remedial scheme, and it held that Congress impliedly foreclosed § 1983 remedies.[33]

The Third Circuit's reasoning is flawed in several respects. First, the TCA's provisions are not remedial. We can hardly consider the limitations period a remedy. Shortening the limitations period to thirty days imposes a burden on an aggrieved plaintiff, not a benefit. The TCA's provision allowing a plaintiff to "commence an action in any court of competent jurisdiction" is hollow as well. The only benefit to an aggrieved plaintiff is expedited judicial review. However, an expedited decision does nothing to remedy a TCA

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[28] 286 F.3d 687 (3d Cir. 2002).

[29] *Id.* at 695.

[30] *Id.* at 694–95.

[31] *Id.* at 695.

[32] *Id.*

[33] *Id.* at 696. *But see Omnipoint Holdings, Inc. v. Town of Westford*, 206 F. Supp. 2d 166, 173–74 (D. Mass. 2002) (holding that the TCA contains only substantive, not remedial, provisions and thus allows § 1983 remedies).

violation in itself. Significantly, a court can fully comply with all of the TCA's provisions before it determines liability. Thus, the TCA contains *procedural*, rather than *remedial*, provisions.

Second, the TCA's provisions are compatible with § 1983's remedies. As we said, the TCA's provisions are procedural in nature—not remedial. Congress can limit the time in which a plaintiff can file for relief, and require an expeditious review in any court of competent jurisdiction, without inadvertently limiting the plaintiff's remedies at the same time. Were we to consider the TCA's procedural provisions sufficiently comprehensive to foreclose § 1983 remedies, we would prevent Congress from ever providing statutes of limitations or other procedural provisions without also defining specific remedies. Such a holding would unnecessarily limit § 1983 remedies to those generic statutes that grant a right and nothing else. We decline to take that path. The TCA's procedural provisions are compatible with § 1983's remedial provisions.

Finally, the Third Circuit's reasoning is contrary to Ninth Circuit precedent in *Keaukaha–Panaewa Community Association v. Hawaiian Homes Commission.*[34] [In] *Keaukaha–Panaewa*, we applied the strong presumption in favor of § 1983 remedies. The underlying statute granted one public remedy. We nonetheless concluded that the rights-granting statute did not contain a comprehensive remedial scheme.[35] The TCA contains no remedial provisions, let alone a comprehensive remedial scheme. Thus, we depart from the Third Circuit and hold that Congress did not impliedly foreclose § 1983's remedial provisions.

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[34] 739 F.2d 1467 (9th Cir. 1984).

[35] *Id.* at 1471.

D. *The TCA Confirms Congress's Affirmative Intent to Preserve Section 1983 Remedies*

We further note that Congress did not simply refrain from foreclosing § 1983 remedies by implication. To the contrary, Congress actually affirmed its contrary intent in § 601(c)(1) of the TCA:

> No implied effect.—This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, state, or local law unless expressly so provided in such Act or amendments.[36]

As the Eleventh Circuit explained in its vacated decision *AT & T Wireless PCS, Inc. v. City of Atlanta*,[37] the plain language of § 601(c)(1) demonstrates that Congress did not intend the TCA to alter the operation of any federal law unless the TCA expressly provided for such change.[38] Section 1983 clearly falls within the parameters of this general savings clause.[39]

Certainly, Congress could have been more specific in addressing the preservation of § 1983 remedies. In addition to enacting § 601(c)(1), Congress preserved state and local tax laws in § 601(c)(2) and provided in § 601(b)(1) that the TCA would not alter the applicability of antitrust laws. But, as the Eleventh Circuit observed, Congress was not required to be any more specific than it was in § 601(c)(1).[40] The import and scope of the general savings clause's language are clear.

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[36] Pub. L. No. 104–104 § 601, 110 Stat. 143 (1996), *reprinted in* 47 U.S.C. § 152, historical and statutory notes.

[37] 210 F.3d 1322 (11th Cir. 2000), *vacated on rehearing en banc by* 260 F.3d 1320 (11th Cir. 2001).

[38] *Id.* at 1328.

[39] *Id.*

[40] *Id.* at 1329–30.

The Supreme Court has held in other instances that savings clauses did not provide evidence of Congress's intent to preserve § 1983 remedies. In *Sea Clammers*, the Court concluded that the Federal Water Pollution Control Act ("FWPCA")[41] and Marine Protection, Research, and Sanctuaries Act of 1972 ("MPRSA"), codified in scattered sections of 33 U.S.C., impliedly foreclosed § 1983 remedies.[42] The Court then held that the statutes' savings clauses did not indicate that Congress had intended to preserve recourse to § 1983.[43] The FWPCA savings clause provided:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).[44]

The MPRSA savings clause provided:

> The injunctive relief provided by this subsection shall not restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief (including relief against the Administrator, the Secretary, or a State agency).[45]

The Court reasoned that these savings clauses were intended to preserve plaintiffs' rights to sue to enforce "anti-pollution standards arising under *other* statutes or state common

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[41] 33 U.S.C. §§ 1251–1387.

[42] *Sea Clammers*, 453 U.S. at 21, 101 S. Ct. 2615.

[43] *Id.* at 20 n. 31, 101 S. Ct. 2615.

[44] *Id.* at 7 n. 10, 101 S. Ct. 2615 (quoting 33 U.S.C. § 1365(e)) (citation omitted).

[45] *Id.* at 7 n. 11, 101 S. Ct. 2615 (quoting 33 U.S.C. § 1415(g)(5)) (citation omitted).

law,"[46]—that is, substantive rights independent of those created by the FWPCA and MPRSA. Because § 1983 does not itself confer substantive rights but "merely provides a mechanism for enforcing individual rights 'secured' elsewhere,"[47] this was quite different from an intent to preserve a cause of action under § 1983, based on the very substantive rights created by the FWPCA and MPRSA.[48]

As the Eleventh Circuit reasoned, the TCA's savings clause is distinguishable from the FWPCA's and MPRSA's savings clauses. The TCA's general savings clause forbids the impairment of any federal "law"—not the impairment of any "right." Thus, the TCA's general savings clause sweeps more broadly than those the Supreme Court evaluated in *Sea Clammers* and includes § 1983 within its ambit.

In sum, we are persuaded by the Eleventh Circuit's reasoning. While our analysis that Congress did not foreclose resort to § 1983 by implication is sufficient on its own, we further hold that Congress, by enacting § 601(c)(1) of the TCA, indicated its affirmative intent to preserve § 1983 remedies.

III. CONCLUSION

The City failed to rebut the presumption in favor of § 1983 remedies. Accordingly, the presumption applies, and the district court should award § 1983 damages.[49]

REVERSED AND REMANDED.

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[46] *Id.* at 10 n. 31, 101 S. Ct. 2615.

[47] *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002).

[48] *See Sea Clammers*, 453 U.S. at 10 n. 31.

[49] Our holding makes it unnecessary to address Abrams' argument that, regardless of whether § 1983 remedies are available under the TCA, he could still have recovered attorney's fees under § 1988 for a due process violation.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CV00-09071-SVW (RNBx)
Filed: Mar. 18, 2002

MARK J. ABRAMS,
Plaintiff and Petitioner,

v.

CITY OF RANCHO PALOS VERDES, A MUNICIPALITY; CITY OF RANCHO PALOS VERDES CITY COUNCIL; FRANK LYON; LARRY CLARK; JON CARTWRIGHT; THOMAS LONG; CRAIG MUELLER; THEODORE PAULSON; DONALD VANNORSDALL; JOHN MCTAGGART; DOUGLAS STERN; LEE BYRD; BARBARA FERRARO; MARILYN LYON; AND SUPERIOR COURT OF LOS ANGELES COUNTY,
Defendants and Respondents.

JUDGMENT OF INJUNCTION

On December 3, 2001, after reviewing trial briefs from the parties, and after reviewing the six-volume administrative record of proceedings lodged with the Court, the Court heard the petition filed by plaintiff Mark J. Abrams ("plaintiff") under the Telecommunications Act of 1996 ("TCA") (47 U.S.C. § 332(c)). Plaintiff challenged the decision of defendant City Council of the City of Rancho Palos Verdes ("City Council") to deny him a Conditional Use Permit ("CUP") to allow the existing antenna support structure and the antennae located thereon at 44 Oceanaire Drive for commercial use, as defined in Rancho Palos Verdes Municipal Code Section 17.96.090. On January 9, 2002, the Court entered an Order

vacating the City Council's denial of a CUP. After further briefing by the parties, the Court held a hearing on February 25, 2002 to determine the appropriate remedy. At the conclusion of the hearing, the Court announced that it would issue an injunction remanding the matter to the City Council, and compelling the City Council upon remand to grant plaintiff a CUP subject to reasonable conditions. The Court further announced that the remedies available to plaintiff are subsumed under the TCA, and that damages pursuant to 42 U.S.C. § 1983 are not available to plaintiff. Now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the matter of plaintiff's application to the City of Rancho Palos Verdes for Conditional Use Permit No. 207 is remanded to the City Council of the City of Rancho Palos Verdes.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the City Council of the City of Rancho Palos Verdes is enjoined, mandated and compelled to set aside its earlier resolution denying plaintiff's application for Conditional Use Permit No. 207 and to adopt a new resolution granting plaintiff a Conditional Use Permit.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the City Council of the City of Rancho Palos Verdes may include within the new resolution granting plaintiff a Conditional Use Permit any reasonable conditions that are consistent with the Court's Order entered January 9, 2002. The City Council may not impose a condition requiring plaintiff to lower his existing antenna support structure.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the City Council of the City of Rancho Palos Verdes shall begin considering, no later than its regularly scheduled meeting on March 19, 2002, what conditions, if any, to include within the new resolution granting plaintiff a Conditional Use Permit. The City Council of the City of

Rancho Palos Verdes shall adopt the new resolution no later than the following regularly scheduled meeting on April 2, 2002.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court shall retain jurisdiction to hear any matters which a party may raise in connection with the issuance of the Conditional Use Permit to plaintiff including, but not limited to, reviewing any conditions which the City Council of the City of Rancho Palos Verdes may impose thereon.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff's request for damages under 42 U.S.C. § 1983 and plaintiff's corresponding request for attorney's fees under 42 U.S.C. § 1988 are DENIED.

DATED: March 18, 2002

/s/ STEVEN V. WILSON
STEVEN V. WILSON
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA

No. CV00-09071-SVW (RNBx)
Filed: Jan. 9, 2002

MARK J. ABRAMS,
Plaintiff and Petitioner,

v.

CITY OF RANCHO PALOS VERDES, A MUNICIPALITY; CITY OF RANCHO PALOS VERDES PLANNING COMMISSION; CITY OF RANCHO PALOS VERDES CITY COUNCIL; FRANK LYON; LARRY CLARK; JON CARTWRIGHT; THOMAS LONG; CRAIG MUELLER; THEODORE PAULSON; DONALD VANNORSDALL; JOHN MCTAGGART; DOUGLAS STERN; LEE BYRD; BARBARA FERRARO; MARILYN LYON; AND SUPERIOR COURT OF LOS ANGELES COUNTY,
Defendants and Respondents.

ORDER GRANTING PETITION TO VACATE DEFENDANTS' DECISION TO DENY PLAINTIFF A CONDITIONAL USE PERMIT

I. INTRODUCTION

Plaintiff is seeking a reversal of the denial of a conditional use permit (CUP) on the grounds that the decision by Defendant City of Rancho Palos Verdes City Council was in

violation of the Telecommunications Act of 1996 (TCA).[1] In particular, Plaintiff claims that the decision is in violation of three provisions of the Act: (1) the decision unreasonably discriminates against providers of functionally equivalent personal wireless services (§ 332(c)(7)(B)(i)(I)); (2) the decision has the effect of prohibiting the provision of personal wireless services (§ 332(c)(7)(B)(i)(II)); and (3) the decision was not supported by substantial evidence contained in a written record (§ 332(c)(7)(B)(iii)).

Additionally, Plaintiff contends that he is entitled to monetary relief under 42 U.S.C. § 1983, and argues that he is entitled to relief under California law as well. Specifically, Cal. Civ. Proc. Code § 1094.5 allows for a mandamus review of administrative decisions under an abuse of discretion standard.

Given the heightened standard of review under the California code as compared to the TCA, and the fact that the § 1983 claim is dependent on a finding that the TCA was violated, it is only necessary at this time to evaluate whether the Defendants' denial of a CUP violated one of the three TCA provisions cited above.

As set forth below, Plaintiff's petition to vacate Defendants' decision to deny him a conditional use permit, on the

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[1] The relevant portions of Section 704 of the Telecommunications Act of 1996 (47 U.S.C. § 332(c)(7)(B)) are as follows:

> (i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—(I) shall not unreasonably discriminate among providers of functionally equivalent services; and (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services. . . . (iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

grounds that it was in violation of the Telecommunications Act of 1996, is GRANTED. The Court reserves judgment on the appropriate remedy under the TCA and 42 U.S.C. § 1983 pending further briefing.

II. PROCEDURAL BACKGROUND

A. Jurisdiction

This Court has jurisdiction to hear this case pursuant to 47 U.S.C. § 332(c)(7)(B)(v) and 28 U.S.C. § 1331. § 332(c)(7)(B)(v) provides that "[a]ny person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis."

B. Standing

Plaintiff has standing to bring this action because he is a person allegedly adversely affected by the decision to deny him a CUP. Furthermore, his services are covered by the relevant provisions of the TCA. because they qualify as "personal wireless services" and "personal wireless service facilities" as defined in 47 U.S.C. § 332(c)(7)(C)(i) and (ii).[2] The parties do not dispute the applicability of the TCA to the Defendants' denial of Plaintiff's CUP application.

III. ANALYSIS

A. Was the Decision Supported By Substantial Evidence?

1. *Burden of Proof*

A major contention in this case surrounds the proper allocation of the burden of proof. As a recent district court

[2] Additional definitions of "mobile service" and "commercial mobile service" are contained in 47 U.S.C. § 153(27) and 47 U.S.C. § 332(d)(1), respectively.

opinion noted, however, there is a split of authority on this issue, and the Ninth Circuit has yet to rule on the subject. *See AirTouch Cellular v. City of El Cajon*, 83 F. Supp. 2d 1158, 1164–65 (S.D. Cal. 2000). Several district courts have held that the party seeking to overturn the administrative decision bears the burden of proof,[3] while other courts have declared that the onus is on the administrative body to support its decision.[4]

Although the parties in *AirTouch Cellular* stipulated as to the burden of proof, the court noted a significant difference between review under (B)(i) and (B)(iii) of § 332(c)(7). In a claim under (B)(iii), there is a deference to local findings, and the reviewing court may not go beyond the administrative record in making its decision. In contrast, under (B)(i), there is no such deference, and outside evidence may be considered. *AirTouch Cellular*, 83 F. Supp. 2d at 1163–64 (citing *Cellular Tel. Co. v. Zoning Bd. of Adjustment of Ho-Ho-Kus*, 197 F.3d 64, 71 (3d. Cir. 1999) and *Town of Amherst, N.H. v. Omnipoint Communications Enter. Inc.*, 173 F.3d 9, 16 n.7 (1st Cir. 1999)).

It appears that Congress, under subsection (B)(iii), intended the local regulatory agencies to provide a written account of their decision in order to insure that the decision was justified by substantial evidence, and not to allow the agency to rationalize its decision only upon judicial review. In contrast, evidence showing unreasonable discrimination or prohibition under subsections (B)(i)(I) and (II) must be demonstrated under the totality of the circumstances, and is not

[3] *See, e.g., New Par v. City of Saginaw*, 161 F. Supp. 2d 759, 768 n.1 (E.D. Mich. 2001); *Sprint Spectrum L.P. v. Bd. of County Comm'rs of Jefferson County*, 59 F. Supp. 2d 1101, 1105 (D. Colo. 1999)[.]

[4] *See, e.g., Cellco P'ship v. Town Plan & Zoning Comm'n of Farmington*, 3 F. Supp 2d 178, 182 (D. Conn. 1998); *Sprint Spectrum L.P. v. Town of Easton*, 982 F. Supp. 47, 49 (D. Mass. 1997).

limited to the written record. Thus, a logical interpretation of this scheme would place the burden on the agency to show that its record contains substantial evidence to support its decision, under (B)(iii), but the burden would be on the telecommunications provider applicant to show that the decision unreasonably discriminated against them, or had the effect of prohibiting the provision of personal wireless service, under (B)(i).

2. *Standard of Review*

The standard of review for (B)(iii) is a less contentious issue. Many courts have relied on the Supreme Court's language in *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 477, 71 S. Ct. 456, 459, 95 L. Ed. 456 (1952), which defines substantial evidence as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *See Western PCS II Corp. v. Extraterritorial Zoning Authority of the City and County of Santa Fe*, 957 F. Supp. 1230, 1236 (D.N.M. 1997). "Although the court is not free to substitute its judgment for that of the [local zoning board], it must overturn the board's decision under the substantial evidence test if it 'cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.' " *See BellSouth Mobility, Inc. v. Gwinnett County, Georgia*, 944 F. Supp. 923, 928 (N.D. Ga. 1996) (quoting *Bickerstaff Clay Products Co., Inc. v. N.L.R.B.*, 871 F.2d 980, 984 (11th Cir. 1989)). However, a court "must uphold a decision that has 'substantial support in the record as a whole' even if it might have decided differently as an original matter." *AT&T Wireless PCS, Inc. v. City Council of the City of Virginia Beach*, 155 F.3d 423, 430 (4th Cir. 1998) (quoting *NLRB v. Grand Canyon Mining Co.*, 116 F.3d 1039, 1044 (4th Cir. 1997)).

Substantial evidence "does not mean a large or considerable amount of evidence, but rather such evidence as a reasonable mind might accept as adequate to support a conclusion." *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988) *quoted in AirTouch Cellular*, 83 F. Supp. 2d at 1164; *Omnipoint Corp. v. Zoning Hearing Bd. of Pine Grove Township*, 181 F.3d 403, 408 (3d Cir. 1999). "In determining whether the evidence before an agency was substantial, a court views the record in its entirety and takes account of evidence unfavorable to the agency's decision." *Omnipoint Corp.*, 181 F.3d at 408 (citing *American Textile Mfr. Inst., Inc. v. Donovan*, 452 U.S. 490, 523, 101 S. Ct. 2478, 69 L. Ed. 2d 185 (1981)).

3. *Review of the Record*

Before looking at the evidence on which the City Council relied in denying Plaintiff a CUP, it is helpful to note what Congress itself had considered to be adequate reasons to deny the placement of personal wireless service facilities. The court in *Omnipoint Corp.* provided a useful overview:

> [In passing the TCA,] Congress found that 'siting and zoning decisions by non-federal units of government [ ] have created an inconsistent and, at times, conflicting patchwork of requirements which will inhibit the deployment of Personal Communications Services as well as the rebuilding of a digital technology-based cellular telecommunications network.' H.R. Rep. 104-204, at 94 (1995), reprinted in 1996 U.S.C.C.A.N. 10, 61. But Congress also 'recognize[d] that there are legitimate State and local concerns involved in regulating the siting of such facilities . . . , such as aesthetic values and the costs associated with the use and maintenance of public rights-of-way.' *Id.* at 94–95, reprinted in 1996 U.S.C.C.A.N. at 61. The House version of the Act would have required the FCC to regulate the siting of wireless telephone transmitters, but the Conference Committee instead enacted § 332(c)(7) to 'preserve the authority of

> State and local governments over zoning and land use matters except in . . . limited circumstances . . . .' H.R. Conf. Rep. No. 104-458, at 207–08, reprinted in 1996 U.S.C.C.A.N. at 222.

Omnipoint Corp., 181 F.3d at 407. "As the First Circuit noted, section 332(c)(7) 'is a deliberate compromise between two competing aims—to facilitate nationally the growth of wireless telephone service and to maintain substantial local control over siting of towers.' " *Id.* (quoting *Town of Amherst, N.H. v. Omnipoint Communications Enters., Inc.*, 173 F.3d 9, 13 (1st Cir. 1999)). Thus, in passing the TCA, Congress sought to preserve the right of municipalities to exercise some control over local issues affected by the zoning of personal wireless service facilities, such as the use of public lands.

In light of the above decisions, the Court will now examine the reasons for the City Council's decision. The Council's stated reasons are indicated in Resolution No. 2000-53 ("A Resolution of the City Council of the City of Rancho Palos Verdes Denying the Appeal and Upholding the Planning Commission's Denial of Conditional Use Permit No. 207 with Prejudice, for the Proposed Commercial Use of Existing Antennae on an Existing Antenna Support Structure, Located at 44 Oceanaire Drive in the *Del Cerro* Neighborhood"), found in the Certified Administrative Record (CAR), Vol. 6, Sec. 99, Pages 1656–1668 (hereinafter cited as CAR, 6:99:1656–68). Based on the record, the following are the relevant facts involved in the City Council's decision:

On January 8, 1990, Plaintiff Mark Abrams received approval for a permit to construct a 40-foot high antenna on his property, to be used for amateur radio communications only. For whatever reason, which Defendants claim was erroneous, the permit was issued in April 1990 that allowed Plaintiff to extend the antenna above the 40-foot limit, to its current height of 52 ½ feet. Plaintiff is licensed by the FCC as a Commercial Mobile Radio Service (CMRS) provider, and

apparently has broadcasted commercial signals on the existing antenna, contrary to the conditions of his permit. As a result, the City obtained an injunction against Plaintiff's use of the antenna in 1999, and consequently, Plaintiff was directed to obtain a CUP in order to utilize the existing antenna structure for commercial, as well as amateur, use.

On July 12, 1999, Plaintiff applied for Conditional Use Permit No. 207. Plaintiff's application was denied, and his subsequent appeals were also denied. According to Resolution No. 2000-53, the reasons for the denial were as follows: (1) Plaintiff's original application was approved for an amateur antenna structure, not to be used for commercial purposes or to exceed 40 feet; (2) notwithstanding the original application, Plaintiff's existing antenna stands at a current height of 52 ½ feet, and broadcasts on commercial frequencies; (3) "although the approval of the proposed use would not create new adverse visual impacts, it would perpetuate existing adverse visual impacts in support of a use that disproportionately benefits the commercial interests of the applicant to the detriment of the immediately surrounding neighborhood"; and (4) approval of the CUP "would establish precedent for, and contribute to, adverse cumulative visual impacts due to future proposals for similar projects." *See* CAR, 6:99:1659–60.

It is clear from the record that the City, and particularly the community in which Plaintiff resides, detests Plaintiff's antenna structure. The record contains several petitions and letters from the local community protesting the Plaintiff's application. *See* CAR, 1-2:33:164–337. The complaints generally focus on the visual blight of Plaintiff's antenna, the damage to the property value, and the adversity it creates to the "atmosphere and spirit" of the neighborhood. However, the fact remains [that the] antenna is already in existence, thus there is no further aesthetic impact created by Plaintiff's proposed use. Therefore, aesthetic concerns would not consti-

tute a valid reason for the denial of the CUP in this case. Furthermore, "a decision must be based on more than just residents' concern about neighborhood aesthetics." *AirTouch Cellular*, at 1165. As noted in *Omnipoint Corp.*, "a 'few generalized expressions of concern with 'aesthetics' cannot serve as substantial evidence' for purposes of § 332 (c)(7)(B)(iii) and, similarly, '[a] few generalized concerns about a potential decrease in property values, . . . does not seem adequate to support a conclusion that the permits should be denied.' " 181 F.3d at 409 (quoting *Cellular Telephone Co. v. Town of Oyster Bay*, 166 F.3d 490, 496 (2d Cir. 1999)).

Thus, the Court can glean two actual reasons for the CUP denial: (1) It would contradict the original intention of the 1990 permit; and (2) it could lead to the proliferation of more antennas by other commercial providers.

In light of the available case law, the Court does not consider these reasons sufficient to allow for the denial of the CUP, pursuant to the requirements of the TCA. The first reason indicated above, that the use contradicts the original purpose of the 1990 permit, is immaterial. The record does not indicate that the denial of the CUP would require Plaintiff to remove the antenna, or reduce the height to 40 feet, so the denial of the permit would only be an act of spite by the community.[5] "[L]ocal governments may not mask hostility to wireless communications facilities with unreasoned denials that make only vague references to applicable legal stan-

[5] Defendants suggest for the first time at oral argument that, subsequent to denying the CUP, they will be able to have the Plaintiff's antenna tower removed. However, as Defendants admit, this information is not contained in the record, nor do Defendants offer any admissible evidence in support of this contention. *See British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978) ("[L]egal memoranda and oral argument are not evidence . . ."). Therefore, it cannot serve as a basis for concluding that their decision was supported by substantial evidence, in accordance with the TCA.

dards. The procedural requirement of a written decision with articulated reasons based on record evidence forces local governments to rely on supportable neutral principles if they wish to deny a particular wireless installation." *AT&T Wireless Servs. of Florida, Inc. v. Orange County*, 982 F. Supp. 856, 860 (M.D. Fla. 1997).

The second reason—that approval would lead to a proliferation in antennas—is unfounded. While it is certainly possible that there will be additional applications if this CUP is granted, that does not mean that the City must grant permission for all additional antennas to be built. On the contrary, if additional applications propose new structures that will have adverse impacts on the neighborhood, then that would be a basis for denying the applications under the TCA. In *AirTouch Cellular*, the court allowed the city to deny an application to the plaintiff, despite approving a previous application for a different provider of the same service. The court deemed that the plaintiff's application created additional concerns—notably an increase in antennas, adding additional equipment structures, and an increase in visual blight and noise problems—that did not exist in granting the other provider's application. *AirTouch Cellular*, 83 F. Supp. 2d at 1166. Therefore, the City in this case is free to deny additional applications if they pose additional problems, notwithstanding an approval of Plaintiff's application here.

In all of the cases cited by Defendants that found substantial evidence existed to support a zoning board's denial of a CUP, the provider seeking the CUP was attempting to build a new structure. Defendants have not indicated a single case involving the denial of a permit for an existing structure that was supported by substantial evidence. In contrast, in the few cases that involved an existing structure, such as *Smart SMR of New York, Inc. v. Zoning Comm'n of the Town of Stratford*, 995 F. Supp. 52 (D. Conn. 1998), the courts have found that substantial evidence did not exist.

Accordingly, the evidence included in the record to support the denial of the CUP in the present case does not satisfy the requirements of the TCA.

B. Did the Decision Unreasonably Discriminate?

Plaintiff also claims that the City Council's decision amounts to an unreasonable discrimination among providers of functionally equivalent services, in violation of § 332 (c)(7)(B)(i)(I).

Again, there is a contention over who bears the burden of proof in the situation. As noted in the previous section, Plaintiff cites one set of authority, while Defendants cite another set of contradictory authority. However, a claim under (B)(i), unlike (B)(iii), encompasses all available evidence, and not solely the administrative record. Thus, it is less compelling under a (B)(i) claim that there should be a deviance from the usual burden being placed on the plaintiff, because the plaintiff is no longer limited to the defendant's accumulation of the evidence in a written record.

Regardless, it is clear that the standard under this provision is not whether the Defendant discriminated against Plaintiff, but whether it did so *unreasonably*. *See, e.g., Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630, 638–39 (2d Cir. 1999). A zoning authority acts reasonably if it had a legitimate basis for its denial of a CUP. *AT&T Wireless PCS, Inc. v. City Council of the City of Virginia Beach*, 979 F. Supp. 416, 425 (E.D. Va. 1997). "According to the legislative history, a zoning authority may consider factors such as visual, aesthetic, or safety concerns." *Smart SMR*, 995 F. Supp. at 59 (citing H.R. Rep. No. 104-458, at 208 (1996)).

As an initial matter, Defendants assert that Plaintiff does not compete with providers of functionally equivalent services, such as cellular telephone utility companies, which do not have to obtain CUPs because they are exempted from the definition of "commercial antenna" in the City's ordinance.

See CAR, 5:83:1474. It is undisputed that Plaintiff does not provide cellular service, but instead provides two-way radio personal wireless communication. Defendants cite to various points in the record where Plaintiff contends that his service competes with cellular service, and other citations where Plaintiff claims that his service is different than cellular service. Defendants' Opp'n, at 7–8.

In response, Plaintiff claims that he does compete with cellular services. First, he claims that it is logical to conclude that if a customer desires two-way radio service, but cannot obtain such service, then he would have to move to cellular service. Therefore, while their services are not identical, radio service and cellular service are competitors, and provide competing services. Plaintiff's Reply, at 9–11. Moreover, the company Nextel does provide a "functionally-equivalent" service, because it combines two-way radio (Plaintiff's service) and cellular service into one unit. Thus, at the very least, there is one functionally-equivalent service to Plaintiff's.

Assuming the Plaintiff's service is functionally-equivalent with one of Nextel's services, Defendants still claim that its decision "was well-grounded in its legitimate land use concerns of avoiding proliferation of commercial antenna towers in residential neighborhoods." Defendants' Opp'n, at 8. "The fact that a decision has the effect of favoring one competitor, in and of itself, is not actionable . . . ." *Virginia Beach*, 979 F. Supp. at 425.

However, as noted in the previous discussion, Defendants' reasons for denying the CUP do not appear legitimate or convincing. Therefore, if Defendants cannot show that they had substantial evidence to deny Plaintiff's CUP application in the first place, it follows that, with nothing more, their discrimination against Plaintiff's service could be deemed unreasonable. The operative fact here is that there is already an existing structure on Plaintiff's property, regardless of the

City's aversion to the structure. Defendants do not provide any admissible evidence from which to conclude that as a consequence of denying the CUP, they will thereby be able to force Plaintiff to remove the antenna structure that they had at one time approved. Even if that was their intention, as it stands, Plaintiff's structure is legally on his property, and therefore any aesthetic and visual concerns surrounding the CUP could only relate to modifications in the existing structure. However, as Defendants concede in Resolution No. 2000-53, "approval of the proposed use would *not create new adverse visual impacts* . . . ." CAR, 6:99:1660 (emphasis added).

The court in *Smart SMR* faced a somewhat similar situation—in that there was an existing structure—and decided that only the aesthetic implication with regard to the modifications could be considered. Furthermore, the court noted that "the [zoning authority] cannot rely on the commercial nature of [the plaintiff's] facility as a substantial basis for its decision." *Id.* at 59. Therefore, Defendants' decision, in light of the available evidence, appears unreasonable.

As a final matter, Defendants have proposed at least one alternative site from which Plaintiff can conduct its service. Defendants' Opp'n, at 11. Defendants contend that Plaintiff, in order to prevail on an unreasonable discrimination claim, has to show that the alternative site would not provide coverage equivalent to a competitor's. *See Willoth*, 176 F.3d at 638. Whether Plaintiff actually must make this showing, however, is unclear. First, the court in *Willoth* merely mentioned that the plaintiff in that case did not make the above showing; the court did not say that such a showing was a prerequisite to recovery. Second, the *Willoth* court also found that the defendant's decision to deny the permit was supported by substantial evidence. That being the case, it appears much easier to conclude that any resulting discrimination was reasonable.

Notwithstanding the question of its relevance, the record does indicate that Defendants have proposed an alternative site (at St. John Fisher Church) to Plaintiff, which Defendants' experts contend would satisfy Plaintiff's needs. *See* CAR, 4:60:987 (Item 7); 5:78:1421–22. Plaintiff disputes that such a site would be as adequate as the one for which he is seeking a CUP, and, at the very least, having to construct a new antenna at the alternative site would be cost-prohibitive. Plaintiff's Reply, at 14–15. Nevertheless, the outcome under this provision in this case ultimately turns on whether the City's refusal to allow Plaintiff a CUP on his property was reasonable, without regard to any alternative sites, considering Plaintiff already has an existing structure at the proposed site. As discussed above, the record does not support Defendants' decision under the "substantial evidence" analysis. Even outside of the record, Plaintiff appears to have carried his burden of showing that Defendants' decision was unreasonable as well.

However, at oral argument, Defendants indicate that the CUP should not be allowed because Plaintiff had subverted the permit process by first applying for an amateur license, and then applying for a commercial license after the antenna was already erected and approved. While there is no evidence from which to conclude that Plaintiff did in fact have dubious intentions when he applied for an amateur license, this does present an interesting quandary. Although this potential loophole in the licensing structure is Defendants' own doing, since it is only possible through the commercial and amateur licensing schemes that Defendants have promulgated themselves, Defendants argue that their relaxed process for obtaining an amateur radio operator's license is in accordance with FCC policy, PRB-1. *See* 101 F.C.C.2d 952 (1985).[6] Therefore, pursuant to Defendants' argument, these

[6] PRB-1 instructed that "State and local regulation of a station antenna structure must not preclude amateur service communications. Rather, it

government policies (the TCA of 1996 and PRB-1) allow for a potential commercial operator to obtain commercial licensing approval despite the objections of the licencing body, by first obtaining an amateur license, as Plaintiff has allegedly attempted to do here.[7]

While the Court acknowledges this potential problem, it need not be resolved here. The Court has already concluded that the denial of the CUP was not supported by substantial evidence contained in the written record, and therefore was in violation of the TCA. Thus, even if the denial of the CUP did not unreasonably discriminate against Plaintiff, because the decision was necessary to avoid the creation of a licensing loophole, this reason was not stated in the record, and therefore does not satisfy the requirements of (B)(iii).[8]

C. Was the Decision a Prohibition on the Provision of Personal Wireless Services?

This is Plaintiff's weakest contention. In order to show that a decision has the effect of prohibiting the provision of personal wireless services, courts have declared that the zoning authority's decision must amount to a ban.

> If the criteria or their administration effectively preclude towers no matter what the carrier does, they may amount to a ban 'in effect' even though substantial evidence will

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must reasonably accommodate such communications and must constitute the minimum practicable regulation to accomplish the state or local authority's legitimate purpose." 47 C.F.R. § 97.15 (2001).

[7] However, nothing in the FCC policy (or the TCA) sets forth a specific licensing structure that a local government must follow. That is left to the discretion of the local government or municipality, to be exercised in accordance with the policies discussed by the FCC.

[8] The Court is not implying that Defendants' argument regarding PRB-1 would necessarily defeat Plaintiff's claim of a § 332(c)(7)(B)(i)(I) violation in this case. The Court is simply declining to rule on the matter, in light of its previous ruling under § 332(c)(7)(B)(iii).

> almost certainly exist for the denial. In that event, the regulation is unlawful under the statute's 'effect' provision. But the burden for the carrier invoking this provision is a heavy one: to show from language or circumstances not just that this application has been rejected but that further reasonable efforts are so likely to be fruitless that it is a waste of time even to try.

Amherst, 173 F.3d at 14 (citation omitted). The *Amherst* court noted, however, that if the plaintiff's existing proposal were the only feasible plan, then its denial might amount to a prohibition of personal wireless service. Nevertheless, given the Defendants' alternative site proposal, that is not the case here.

In light of this difficult standard, at least one court has suggested that the provider "must bring additional proof to the court to demonstrate that the denial is representative of a broader policy or circumstance that precludes the provision of wireless service." *APT Pittsburgh Ltd. P'Ship v. Penn Township Butler County of Pennsylvania*, 196 F.3d 469, 479 (3d Cir. 1999). "In order to show a violation of subsection 332(c)(7)(B)(i)(II) under *Willoth*, an unsuccessful provider applicant must show two things. First, the provider must show that its facility will fill an existing significant gap in the ability of remote users to access the national telephone network. . . . Second, the provider applicant must also show that the manner in which it proposes to fill the significant gap in service is the least intrusive on the values that the denial sought to serve." *Id.* at 480.

In *360° Communications v. Bd. of Supervisors of Albemarle County*, 211 F.3d 79 (4th Cir. 2000), however, the Fourth Circuit rejected the above rule followed by the Second and Third Circuits. "We believe that this statutory question requires no additional formulation and can best be answered through the case-by-case analysis that the Act anticipates." *Id.* at 87.

Regardless of the appropriate test, Plaintiff is unable to satisfy his burden. First, most courts agree that the burden in this instance is on the provider applicant, and it is a heavy one. *See, e.g., Amherst*, 173 F.3d at 14. Second, Plaintiff's contention that the denial of the CUP results in coverage gaps is not supported by sufficient evidence. Third, Plaintiff's argument that his proposal is the "least intrusive means" is rebutted by Defendants, who claim that a structure at the alternative site would be less intrusive, even if it is less optimal. Finally, Defendants have twice before approved CUPs for commercial antennae on single-family zoned property, which they claim clearly indicates their decision here does not amount to a "ban." *See* CAR, 5:76:1384–85.

Taken together, Plaintiff has failed to demonstrate that the City Council's decision to deny him a CUP amounts to a prohibition of the provision of personal wireless services.

IV. REMEDY

The relevant provisions of the TCA direct the Court to "decide [this] action on an expedited basis." 47 U.S.C. § 332 (c)(7)(B)(v). Accordingly, the Court is given broad authority to fasten an appropriate remedy that would bring expedited relief. *See Sprint Spectrum L.P. v. Jefferson County*, 968 F. Supp. 1457, 1463 (N.D. Ala. 1997) (finding that the TCA vests the district court with sufficient authority to grant mandamus relief); *Illinois RSA No. 3, Inc. v. County of Peoria*, 963 F. Supp. 732, 747 (C.D. Ill. 1997) (finding that appropriate relief under the TCA was an injunction directing the county to issue the requested special use permit).

The Court orders the parties to submit further briefing (no more than ten pages in length) regarding the appropriate remedy in this case, as well as on the issue of damages pursuant to 42 U.S.C. § 1983. The Plaintiff is directed to file his brief no later than January 28, 2002. The Defendants are directed to file their response to Plaintiff's brief no later than

February 11, 2002. A hearing on this matter is hereby set for February 25, 2002 at 1:30 pm.

V. CONCLUSION

Based on the above discussion, Plaintiff's petition to vacate Defendants' decision to deny him a conditional use permit, on the grounds that it was in violation of the Telecommunications Act of 1996, is GRANTED. The Court reserves judgment on the appropriate remedy under the TCA and 42 U.S.C. § 1983 pending further briefing.

IT IS SO ORDERED.

DATED: 1/9/02

/s/ Stephen V. Wilson
STEPHEN V. WILSON
United States District Judge

APPENDIX D

RESOLUTION NO. 2000-53

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF RANCHO PALOS VERDES DENYING THE APPEAL AND UPHOLDING THE PLANNING COMMISSION'S DENIAL OF CONDITIONAL USE PERMIT NO. 207 WITH PREJUDICE, FOR THE PROPOSED COMMERCIAL USE OF EXISTING ANTENNAE ON AN EXISTING ANTENNA SUPPORT STRUCTURE, LOCATED AT 44 OCEANAIRE DRIVE IN THE *DEL CERRO* NEIGHBORHOOD

WHEREAS, on January 8, 1990, the applicant/appellant, Mark Abrams, received approval of an application for Site Plan Review No. 5322 to permit the construction of a 40-foot-tall amateur radio antenna support structure and array on his property at 44 Oceanaire Drive in the *Del Cerro* neighborhood, which could be used only for amateur radio communications and was conditioned expressly to exclude commercial operations; and

WHEREAS, on January 19, 1998, Mr. Abrams received approval of an application for Site Plan Review No. 8017 to permit the construction of a second, similar amateur radio antenna support structure and array on the same property; and

WHEREAS, on January 20, 1998, the City's approval of Site Plan Review No. 8017 was appealed to the Planning Commission by Karyl Newton, the owner of the adjacent property at 46 Oceanaire Drive; and

WHEREAS, at a duly noticed public hearing on the appeal of Site Plan Review No. 8017, Mr. Abrams admitted that there was at least one antenna on the existing support structure and array that was used for commercial purposes,

and evidence was also presented to the Planning Commission which confirmed this commercial use and demonstrated that the existing antenna support structure and array was taller than forty feet (40'0"); and

WHEREAS, the Planning Commission's consideration of the appeal of Site Plan Review No. 8017 was continued to a date certain, and was subsequently tabled by the imposition of a moratorium on applications for second antenna support structures, and the application subsequently was voided by the enactment of revisions to the City's antenna regulations; and

WHEREAS, the City investigated the allegations regarding the height of the existing antenna support structure and array and found that Building Permit No. 9827 had been erroneously issued and finaled in 1990 to allow the antenna support structure and array to exceed the 40-foot height limit; and

WHEREAS, the City obtained warrants from the court and retained an expert in the field of radio transmissions, Dr. Henry Richter, to monitor transmissions from the site in connection with an investigation of the allegations regarding commercial use of the existing antennae and found that the allegations were valid. Subsequently, on June 29, 1999, the Los Angeles County Superior Court granted the City's motion for a preliminary injunction, and on September 13, 1999, the court issued its written order, preventing Mr. Abrams from using the antennae for commercial purposes unless and until the City approved a conditional use permit for that use; and

WHEREAS, Section 17.76.020(A) of the Rancho Palos Verdes Municipal Code requires an individual to obtain a conditional use permit to install or operate a commercial antenna within the City of Rancho Palos Verdes

("City"). Section 17.96.090 defines the term "commercial antenna" as follows:

> " 'Commercial Antenna' means all antennas, parabolic dishes, relay towers and antenna support structures used for the transmission or reception of radio, television and communication signals for commercial purposes. For the purpose of this definition, 'commercial purposes' shall mean communications for hire or material compensation, or the use of commercial frequencies, as these terms are defined by the Federal Communications Commission (FCC). 'Commercial antennas' shall not include antennas owned or operated by governmental agencies; and microcell cellular antennas, owned and operated by state licensed cellular telephone utility companies, located on existing utility poles within the public right-of-way."

Under these provisions of the Rancho Palos Verdes Municipal Code, the applicant, Mr. Abrams, was required to obtain a conditional use permit from the City to use his existing antennae and antenna support structure to broadcast on commercial frequencies, as determined by the Federal Communications Commission ("FCC"); and

WHEREAS, on July 12, 1999, September 30, 1999, and January 21, 2000, Mr. Abrams submitted applications and supplemental information for Conditional Use Permit No. 207 and Environmental Assessment No. 720 to allow the commercial use of certain of the existing antennae on the existing antenna support structure on his property in the *Del Cerro* neighborhood; and

WHEREAS, on January 31, 2000, the applications for Conditional Use Permit No. 207 and Environmental Assessment No. 720 were deemed complete by Staff; and

WHEREAS, pursuant to the provisions of the California Environmental Quality Act, Public Resources Code Sections 21000 *et. seq.* ("CEQA"), the State's CEQA Guidelines,

California Code of Regulations, Title 14, Section 15000 *et. seq.*, the City's Local CEQA Guidelines, and Government Code Section 65962.5(f) (Hazardous Waste and Substances Statement), the City of Rancho Palos Verdes prepared an Initial Study and determined that the approval of Conditional Use Permit No. 207 could result in a significant adverse effect upon the environment unless mitigation measures were imposed and, therefore, a draft Mitigated Negative Declaration has been prepared and notice of same was given in the manner required by law; and

WHEREAS, after notice issued pursuant to the requirements of the Rancho Palos Verdes Development Code and the State CEQA Guidelines, the Planning Commission held a duly noticed public hearing on April 25, 2000, and May 9, 2000, at which time all interested parties were given an opportunity to be heard and present evidence; and

WHEREAS, on May 9, 2000, the Planning Commission adopted P.C. Resolution No. 2000-12, thereby denying the application for Conditional Use Permit No. 207 with prejudice; and

WHEREAS, on May 10, 2000, within the 15-day appeal period prescribed by Section 17.80.070 of the Rancho Palos Verdes Development Code, Mr. Abrams appealed the Planning Commission's denial of Conditional Use Permit No. 207 to the City Council; and

WHEREAS, after notice issued pursuant to the requirements of the Rancho Palos Verdes Development Code, the City Council held a duly noticed public hearing on June 6, 2000, and July 5, 2000, at which time all interested parties were given an opportunity to be heard and present evidence; and

WHEREAS, after the public hearing was closed on July 5, 2000, the applicant objected to some of the information that had been submitted to the City Council during the public

hearing and also sought to present additional information to the City Council, even though the public hearing already had been closed; and

WHEREAS, in order to address Mr. Abrams' concerns, on July 18, 2000, the City Council directed staff to re-notice the public hearing so that it could be re-opened and any additional information that is relevant to the application could be considered by the City Council prior to making a decision on the application; and

WHEREAS, the re-opened public hearing was held on August 15, 2000, at which time all interested parties were given an opportunity to be heard and present evidence that had not been presented previously to the City Council;

NOW, THEREFORE, THE CITY COUNCIL DOES HEREBY FIND, DETERMINE, AND RESOLVE AS FOLLOWS:

Section 1: The site is not adequate in size and shape to accommodate the proposed commercial use because Sections 17.76.020(A)(5) and 17.76.020(A)(8) of the Rancho Palos Verdes Development Code require that the proposed commercial use "have the least visual impact on the environment" and provide landscaping and screening to "screen and buffer towers, accessory uses and stored equipment," respectively, but the existing tower is sited and designed to take maximum advantage of the elevation and topography, and not to minimize its visual impacts on adjacent properties. If the subject property were larger so that the tower could be located further from adjacent residences and rights-of-way, the increased distance might have the effect of screening and buffering the visual impacts of the existing tower. Attempting to screen the existing tower and antennae with foliage would not be effective because most surrounding properties are at the same elevation or only slightly higher than the subject property. Therefore, given the constraints of the subject

property, it is not reasonably possible to reduce the visual impacts of the existing tower and antennae without modifying its height, location and/or configuration.

Section 2: In response to a question that was posed during the public hearing on the appeal, the applicant, Mr. Abrams, stated that he would not consider any alteration or reduction of the height, size, configuration or location of the existing tower or any of the antennae located thereon in order to reduce the visual and aesthetic impacts of the antenna tower upon adjacent properties or the surrounding neighborhood. On the other hand, the City's expert, Dr. Richter, testified that in his professional opinion, if the height of the applicant's antenna support structure and the antennas located thereon were reduced from the current height of fifty-two and one-half feet to forty feet, there would not be an appreciable change in the applicant's ability to transmit radio signals. Dr. Richter further opined that it was possible to reduce the overall mass of the antenna structure and the number of antennae located thereon and still allow Mr. Abrams to transmit both on commercial and amateur frequencies from his property at 44 Oceanaire Drive.

Section 3: The approval of the subject commercial use at this specific location will result in significant adverse effects on adjacent properties and the permitted use thereof because the commercial use of some of the antennae constitutes an intensification of the use of the antennae, and this intensification of use financially benefits the applicant and his business while causing negative visual impacts from the location, height and size of the antenna tower upon surrounding residential properties.

A. The application that was approved by the City in 1990 was for an amateur antenna structure that was expressly conditioned not to be used for commercial purposes and not to exceed forty feet in height, and the applicant expressly agreed to those conditions. Notwithstanding

those conditions, the antenna structure was constructed at a height of fifty-two and one-half feet.

B. In addition, when the City's expert, Dr. Henry Richter, monitored radio transmissions from the subject property in 1999, pursuant to a warrant issued by the court to the City, Dr. Richter detected transmissions on at least three commercial frequencies that had been licensed previously by the FCC to be transmitted from the subject property. Mr. Abrams testified that those transmissions were sent from portable tripod antennas that were located on the ground, behind the rear wall of the subject property and not from the existing structure that had been permitted by the City, and that due to their location behind the wall, they did not function well. However, the City Council cannot determine the accuracy of the applicant's testimony. The City's expert, Dr. Richter, testified that while he was monitoring the site, he could clearly see the rear wall of the property, which he photographed, and he did not observe any tripod antennas that exceeded the height of the rear wall so that the wall would not have interfered with the commercial transmissions from the alleged portable antennas. Mr. Abrams' application demonstrates that the three tallest antennae that are located on the uppermost portion of the antenna support structure would accommodate commercial use, as would many of the other antennae that are located elsewhere on the antenna support structure. (*See also*, paragraph 1 of Abrams' letter dated August 11, 2000.) Thus, it appears that one of the purposes of the existing antenna structure at its current height of fifty-two and a half feet was to accommodate the commercial use of some of the antennae that are located on the tower, even though the permit issued by the City in 1990 specifically provided

that no commercial transmissions could occur and that the height of the antenna structure could not exceed forty feet.

C. Currently, the tower is visually prominent within the neighborhood, and due to its height, configuration and close proximity to surrounding residences and lack of screening or buffers, it has an adverse impact upon adjacent properties. The applicant testified that he would not be willing to modify the antenna tower or any of the antennae located thereon to reduce the adverse aesthetic and visual impacts. Therefore, although the approval of the proposed use would not create new adverse visual impacts, it would perpetuate existing adverse visual impacts in support of a use that disproportionately benefits the commercial interests of the applicant to the detriment of the immediately surrounding neighborhood.

D. In addition to the visual impacts of the existing antennae and tower, the establishment of a commercial antenna of this size and scale in the *Del Cerro* neighborhood would establish precedent for, and contribute to, adverse cumulative visual impacts due to future proposals for similar projects. Such proposals are likely—given the neighborhood's elevation, topography and unique geographic setting—and would have significant adverse cumulative effects upon neighborhood aesthetics and residential property values.

Section 4: The proposed commercial use of the antennae and the tower is contrary to the City's General Plan, which contains the following goals and policies:

> *It is the goal of the City of Rancho Palos Verdes to preserve and enhance the community's quality living environment; to enhance the visual character and physical quality of existing neighborhoods; and to encourage the development of housing in a manner which adequately serves the needs of all present and*

future residents of the community. [Rancho Palos Verdes General Plan, Urban Environment Element, Activity Area Goals (p. 56)]

The City shall discourage industrial and major commercial activities due to the terrain and environmental characteristics of the City. Commercial development shall be carefully and strictly controlled, and limited to consideration of convenience or neighborhood service facilities. [Rancho Palos Verdes General Plan, Urban Environment Element, Activity Area Goals (p. 56)]

It shall be a goal of the City to ensure adequate public utilities and communications services to all residents, while maintaining the quality of the environment. [Rancho Palos Verdes General Plan, Urban Environment Element, Infrastructure Goals (p. 100)]

> *Require adequate landscaping or buffering techniques for all new and existing facilities and networks, in order to reduce the visual impacts of many infrastructure facilities and networks.* [Rancho Palos Verdes General Plan, Urban Environment Element, Infrastructure Policy No. 8 (p. 138)]

Although these goals and policies acknowledge the need for commercial development and the provision of communications services for the City's residents, they also call upon the City to balance these community needs with the preservation of the quality of the City's residential neighborhoods. The City has attempted to balance these objectives by encouraging the installation of commercial antennae in non-single-family residential areas, and the utilization of screening techniques to camouflage the appearance of commercial antennae to the maximum extent practicable, especially in residential zones. As a result, most commercial antennae previously approved by the City have been proposed for properties that are not zoned or used for single-family

residential purposes, or have employed screening techniques to fully (or at least partially) mask the appearance of the antennae.

As is discussed in the Staff report that was prepared for the July 5, 2000 City Council meeting, the City has approved two conditional use permits for the construction of antennae in residential zones which are being used for commercial transmissions. In both cases, the antennae were located in a manner that was unobtrusive and did not cause adverse visual and aesthetic impacts upon surrounding residential properties.

In this case, the subject property and surrounding neighborhood are designated Residential, 1-2 DU/acre in the City's General Plan, which is a land use designation intended to accommodate low-density neighborhoods of detached, single-family homes and related accessory uses and structures. The use of the existing antenna support structure and array for amateur purposes is an accessory use to the primary use of the property as a single-family residence, but the proposed commercial use of some of the existing antennae constitutes an intensification of the use of the tower such that the use of the antenna support structure and array is no longer clearly subordinate to the primary permitted use of the subject property. Because this application involves approval of the commercial use of the antennae, which previously was conducted in violation of the Municipal Code, it cannot be determined with certainty how many of the existing antennae were placed on the site for the commercial use and how many were used solely for amateur purposes in accordance with the prior City approval. In addition, unlike the other two antenna structures that were approved for commercial use in residential areas, the size and configuration of the current site and the close proximity of the tower to surrounding residences provides little or no opportunity for effective visual screening and buffering of the tower, which is inconsistent with the General Plan goals and policies discussed in this section.

Section 5: There is at least one, and may be additional locations within the City that can accommodate the applicant's proposed commercial transmissions. The applicant has testified that although he currently is using a private structure located at the FAA's San Pedro Hill site, that site is no longer available to him, because the operator of the area where the commercial antennae are located has asked him to remove his equipment. Mr. Abrams also testified that the County of Los Angeles' antenna site on Crestridge Road is not available to him. Mr. Abrams claims that these are the most technically optimal locations to which he could relocate his existing facilities.

Mr. Abrams initially testified that the location at 44 Oceanaire Drive is the only location in the City that is available for his commercial use. He later testified that there are other locations in the City where he could locate his commercial antenna equipment, but that it would be cost-prohibitive for him to do so, due to the additional height of the antenna support structure that would be needed. He stated that there is no location within the City, including the subject site, that would provide the ability to transmit to all areas of the City and the Palos Verdes Peninsula, because the topography of the area prevents complete coverage from any one location. He submitted evidence that there are several locations where he could actually improve the coverage of his transmissions, if an antenna support structure of approximately two hundred feet or more were constructed. Mr. Abrams did not present testimony regarding the height of the antenna structures that would be required at the other locations in order to duplicate the degree of coverage that he presently has at the subject property.

The City requested that its expert, Dr. Richter, conduct studies of several different sites within the City to determine if any of the sites could be used by the applicant in place of the current location at 44 Oceanaire Drive. Dr. Richter ran

propagation studies from Mr. Abrams' property and from four other properties in the City. Dr. Richter's studies demonstrated that there is at least one alternative site in the City, at the St. John Fisher Church, located on Crest Road, where the applicant's ability to transmit would be increased above the level of coverage from the Oceanaire Drive site, if an eighty-foot antenna support structure were constructed. Dr. Richter disagrees with the conclusions of Mr. Abrams' expert that a 200-foot antenna would be required at the church site in order to have adequate coverage and has concluded that an eighty-foot antenna would provide adequate transmission coverage on the south side of the Palos Verdes Peninsula and would provide improved coverage to the north. It is the opinion of City Staff that if an eighty-foot antenna were located on the church property, it probably would not require a setback variance or demolition of existing structures.

The pastor of the St. John Fisher Church submitted a letter to the City, dated July 3, 2000, stating that the Church was interested in allowing an antenna support structure on that property, either adjacent to the existing maintenance building or incorporated within a structure that is designed as a church bell tower. Mr. Abrams testified that he had met with representatives of the church, and that they had indicated a willingness to explore the possible construction of an antenna tower on the church property. Mr. Abrams submitted a copy of a 1956 deed restriction on that site that he alleges will prevent the church property from being used for this purpose. However, the deed restriction states that it expired as of January 1, 1982.

Thus, there is substantial evidence in the record that refutes the applicant's claim that there are no other viable alternate sites available to him, if the current application is denied. Instead, it appears that there is at least one alternate site that could accommodate the applicant's proposed commercial use

that would have fewer or no adverse impacts on surrounding properties than the proposed location at 44 Oceanaire Drive.

Section 6: The proposed project is not consistent with the City's Wireless Communications Antenna Development Guidelines. The site and configuration of the proposed project is located conspicuously on an existing single-family residence. The size and scale of the proposed use suggests that it is not clearly ancillary to the primary permitted use of the site as a single-family residence (Guideline No. 2). Although the Guidelines encourage co-location of comercial antennae on existing towers (Guideline No. 3), the future placement of additional commercial antennae at this site probably would increase the size and/or configuration of the existing antenna structure and would intensify the commercial use of the site, which would not be consistent with the general intent of the Guidelines to balance the need to provide wireless communications coverage with the need to maintain the quality of life for residents. In addition, although the existing tower does not impair protected views, as defined in the City's Development Code, it is highly visible in the neighborhood immediately surrounding the subject property (Guideline No. 4). The approval of the project as currently proposed would disproportionately benefit the applicant's commercial interests, while causing a significant adverse aesthetic impact upon the surrounding residential neighborhood and the general public, resulting in an imbalance of private versus public costs and benefits (Guideline No. 5). Finally, the size and scale of the proposed project and its close proximity to surrounding residents precludes effective visual screening of the existing antenna support structure and array (Guideline No. 9), since the applicant has testified that he is not willing to modify the height or configuration of the existing antenna support structure or the antennae that are located on the structure.

Section 7: The denial of Conditional Use Permit No. 207 is consistent with the local zoning authority reserved to the City of Rancho Palos Verdes by the Telecommunications Act of 1996 (47 U.S.C. 332(c)(7)) ("the Act") for the following reasons:

A. The denial of Conditional Use Permit No. 207 "[does] not unreasonably discriminate among providers of functionally equivalent services . . . and [does] not prohibit or have the effect of prohibiting the provision of personal wireless services" (47 U.S.C. 332(c)(7), subsections (B)(i)(I) and (II)), because:

   1. The applicant has admitted that not all of the commercial services that he provides are within the scope of the Act and that no one site within the City, including the site at 44 Oceanaire Drive, can provide complete transmission coverage throughout the entire City or the Palos Verdes Peninsula.

   2. Mr. Abrams has refused to consider reducing the size or configuration of his existing antenna support structure to make it more compatible with the surrounding residential area or to consider transmitting from smaller antennas at multiple locations within the City. Despite his refusal to mitigate the adverse aesthetic impacts of the antenna support structure upon the surrounding residential neighborhood, Mr. Abrams nevertheless erroneously contends that under the Act, he is entitled to commercial use of the structure that he already constructed.

   3. In reviewing all of the applications to provide personal wireless services within the City, the City has applied consistently its regulations to these facilities so as to approve facilities that are

compatible with surrounding uses and to modify or deny applications that will have adverse visual and aesthetic impacts upon surrounding properties. The instant application is being denied because it will result in adverse visual and aesthetic impacts upon adjacent properties, and the applicant has refused to alter the antenna structure to eliminate those impacts. Accordingly, the denial of the proposed project does not unreasonably discriminate between the applicant's project and that of any other service provider.

4. The denial of this specific proposal does not prohibit the applicant from providing wireless communications services because the applicant still has the ability to propose the relocation of these services to another site or sites that meet all of the required findings for approval by the City. The City has previously approved applications for commercial antennae for a variety of commercial wireless services and service providers, including applications for properties that were zoned or used for single-family residential purposes. Accordingly, the denial of this particular application also does not result in a ban or prohibition of, or have the effect of prohibiting, the placement of these types of facilities within the City of Rancho Palos Verdes.

5. The denial of this application does not prohibit or have the effect of prohibiting personal wireless services because Mr. Abrams is able to transmit to a few areas within the City from commercial antennas that are located outside of the City, without the existing antenna at 44 Oceanaire Drive, although he has testified that there will be a significant gap in the coverage he provides if the

application to utilize the Oceanaire property is not approved. (Mr. Abrams testified that there are gaps in coverage even if this application is approved.) In addition, denial of the application to broadcast commercially from 44 Oceanaire does not prevent Mr. Abrams from applying to broadcast commercially from one or more other locations in the City, including from the St. John Fisher church site. Meanwhile, there are cellular antennas and other antennas located within the City that currently provide personal wireless services to the public throughout most of the City and the Palos Verdes Peninsula from facilities that are not causing the adverse visual and aesthetic impacts that will be caused by the instant application.

6. Mr. Abrams' proposal to use the existing antenna tower located at his residence for commercial use is the least expensive, most cost effective means for him to provide commercial service, since he will not have to pay anyone to use a different site that he does not own, and he will be able to charge others who use that location from which to broadcast their commercial signals. Mr. Abrams and his attorneys contend that the City has no discretion under the Act to deny the instant application. However, this interpretation is contrary to the express language of Section 704 of the Act, which allows local governmental entities to make decisions regarding the placement, construction and modification of personal wireless service facilities in accordance with the provisions of the Act. Under the Act, Mr. Abrams is not entitled to the precise height, configuration and location of the antenna support structure that he has designed for the particular technology that he

has chosen to utilize to broadcast commercially, especially since he has refused to modify his existing antenna support structure or the technology that he uses to eliminate the adverse aesthetic impacts upon adjacent properties. Also, the fact that Mr. Abrams received City approval for an amateur radio antenna structure, which was expressly conditioned not to be used for commercial purposes, and then broadcast commercially from his property without having obtained the required conditional use permit from the City, also does not entitle him to approval under the Act or prevent the City from denying the application for a conditional use permit to broadcast commercially.

The application for this Conditional Use Permit was deemed complete by City Staff, on January 31, 2000. The City has acted on both the applicant's request for Conditional Use Permit No. 207 and this appeal "within a reasonable period of time after the request [was] duly filed with [the City], taking into account the nature and scope of such request" (47 U.S.C. 332(c)(7), subsection (B)(ii)). This application and the appeal have been processed by the City in a timely fashion and in accordance with the time lines established by the State Permit Streamlining Act and CEQA, and the Telecommunications Act. Indeed, the most recent delay in adopting this resolution was caused primarily by Mr. Abrams' request to augment the record, which could not have been accomplished without re-noticing and re-opening the public hearing. The timing for providing notice of the hearing to the newspaper required an additional delay of twenty-eight days.

C. The decision to deny the application for Conditional Use Permit No. 207 "[is] in writing and supported by substantial evidence contained in a written record" (47 U.S.C. 332(c)(7), subsection (B)(iii)). This Resolution, along with P.C. Resolution No. 2000-12, the Staff reports prepared for all of the Planning Commission and the City Council meetings, the project plans, all of the correspondence and testimony presented to the Planning Commission and City Council, including, without limitation, the testimony presented at the August 15, 2000 City Council meeting, the additional material submitted by Mr. Abrams, the testimony and reports by the City's expert, Dr. Henry Richter, and by the other interested parties, and the Minutes of both the Planning Commission hearing and these proceedings, all of which are incorporated herein by this reference, provide a written record of the basis for the City Council's decision in this matter.

D. In denying the application for Conditional Use Permit No. 207, the City has not "[regulated] the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communications] Commission's regulations concerning such emissions (47 U.S.C. 332(c)(7), subsection (B)(iv)). Although radio frequency emission[s] are identified as an environmental effect in the draft Mitigated Negative Declaration prepared for this application, the environmental analysis clearly states that these effects are not significant and are not within the City's purview to consider or regulate. In addition, the City Attorney advised the City Council that the City Council could not consider any environmental effects of emissions that comply with FCC regulations, including purported impacts upon health or alleged interference with television reception. The City

Council has relied upon that advice and the provisions of the Act and, therefore, has not based its decision to deny the proposed project in any respect upon any actual or perceived environmental effects attributable to radio frequency emissions.

Section 8: The draft Mitigated Negative Declaration that was prepared by Staff, in conjunction with Conditional Use Permit No. 207, is not adopted by the City Council because the City Council finds that the approval of the proposed project will result in significant adverse visual and aesthetic impacts upon properties surrounding the project site, both singularly and cumulatively.

Section 9: The time within which the judicial review of the decision reflected in this Resolution, if available, must be sought is governed by Section 1094.6 of the California Code of Civil Procedure and other applicable short periods of limitation. Pursuant to the Telecommunications Act of 1996 (47 U.S.C. 332(c)(7)(B)(v)) any person adversely affected by the City's final action in this matter may, within thirty (30) days after such action, commence an action in any court of competent jurisdiction.

Section 10: For the foregoing reasons and based on the information and findings included in the Staff Report, Minutes and other records of proceedings, the City Council of the City of Rancho Palos Verdes hereby denies, with prejudice, Conditional Use Permit No. 207 for the proposed commercial use of existing antennae on an existing antenna support structure and array located at 44 Oceanaire Drive in the *Del Cerro* neighborhood. However, this denial is without prejudice to Mr. Abrams's ability to file an application for a conditional use permit to transmit commercially at another location in the City.

PASSED, APPROVED, AND ADOPTED this 15th day of August 2000.

/s/ LEE BYRD
MAYOR

ATTEST:

/s/ JO PURCELL
CITY CLERK

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) ss
CITY OF RANCHO PALOS VERDES)

I, JO PURCELL, City Clerk of the City of Rancho Palos Verdes, do hereby certify that the above Resolution No. 2000-53 was duly and regularly passed and adopted by the said City Council at a regular meeting thereof held on August 15, 2000.

_____
City Clerk
City of Rancho Palos Verdes

APPENDIX E

P.C. RESOLUTION NO. 2000-12

A RESOLUTION OF THE PLANNING COMMISSION OF THE CITY OF RANCHO PALOS VERDES DENYING WITH PREJUDICE CONDITIONAL USE PERMIT NO. 207 FOR THE PROPOSED COMMERCIAL USE OF EXISTING ANTENNAE ON AN EXISTING ANTENNA SUPPORT STRUCTURE, LOCATED AT 44 OCEANAIRE DRIVE IN THE *DEL CERRO* NEIGHBORHOOD

WHEREAS, on January 8, 1990, the applicant, Mark Abrams, received approval of an application for Site Plan Review No. 5322 to permit the construction of a 40-foot-tall amateur radio antenna support structure and array on his property at 44 Oceanaire Drive in the *Del Cerro* neighborhood; and

WHEREAS, on January 19, 1998, Mr. Abrams received approval of an application for Site Plan Review No. 8017 to permit the construction of a second, similar amateur radio antenna support structure and array on the same property; and

WHEREAS, on January 20, 1998, the City's approval of Site Plan Review No. 8017 was appealed to the Planning Commission by Karyl Newton, the owner of the adjacent property at 46 Oceanaire Drive; and

WHEREAS, at a duly noticed public hearing on the appeal of Site Plan Review No. 8017, Mr. Abrams admitted that there was at least one antenna on the existing support structure and array that was used for commercial purposes, and evidence was also presented to the Planning Commission which purported to confirm this commercial use and demonstrated that the existing antenna support structure and array was taller than forty feet (40'0"); and

WHEREAS, the Planning Commission's consideration of the appeal of Site Plan Review No. 8017 was continued to a date certain, was subsequently tabled by the imposition of a moratorium on applications for second antenna support structures, and was ultimately voided by the enactment of revisions to the City's antenna regulations; and

WHEREAS, the City investigated the allegations regarding the height of the existing antenna support structure and array and found that Building Permit No. 9827 had been erroneously issued and finaled in 1990 to allow the antenna support structure and array to exceed the 40-foot height limit; and

WHEREAS, the City investigated the allegations regarding commercial use of the existing antennae and found that they were valid. Subsequently, on June 29, 1999, the Los Angeles County Superior Court granted the City's motion for a preliminary injunction, and on September 13, 1999, the court issued its written order, preventing Mr. Abrams from using the antennae for commercial purposes unless and until the City approved a conditional use permit for the use; and

WHEREAS, on July 12, 1999, September 20, 1999 and January 21, 2000, Mr. Abrams submitted applications and supplemental information for Conditional Use Permit No. 207 and Environmental Assessment No. 720 to allow the commercial use of certain of the existing antennae on the existing antenna support structure on his property in the *Del Cerro* neighborhood; and

WHEREAS, on January 31, 2000, the applications for Conditional Use Permit No. 207 and Environmental Assessment No. 720 were deemed complete by Staff; and

WHEREAS, pursuant to the provisions of the California Environmental Quality Act, Public Resources Code Sections 21000 *et seq.* ("CEQA"), the State's CEQA Guidelines, California Code of Regulations, Title 14, Section 15000

et seq., the City's Local CEQA Guidelines, and Government Code Section 65962.5(f) (Hazardous Waste and Substances Statement), the City of Rancho Palos Verdes prepared an Initial Study and determined that the approval of Conditional Use Permit No. 207 could result in a significant adverse effect upon the environment unless mitigation measures were applied and, therefore, a draft Mitigated Negative Declaration has been prepared and notice of same was given in the manner required by law; and

WHEREAS, after notice issued pursuant to the requirements of the Rancho Palos Verdes Development Code and the State CEQA Guidelines, the Planning Commission held a duly noticed public hearing on April 25, 2000 and May 9, 2000, at which time all interested parties were given an opportunity to be heard and present evidence;

NOW, THEREFORE, THE PLANNING COMMISSION OF THE CITY OF RANCHO PALOS VERDES DOES HEREBY FIND, DETERMINE, AND RESOLVE AS FOLLOWS:

Section 1: The site is not adequate in size and shape to accommodate the proposed use because Sections 17.76.020(A)(5) and 17.76.020(A)(8) of the Rancho Palos Verdes Development Code require that the proposed commercial use "have the least visual impact on the environment" and provide landscaping and screening to "screen and buffer towers, accessory uses and stored equipment," respectively, but the existing tower is sited and designed to take maximum advantage of the elevation and topography, and not to minimize its visual impacts. If the subject property were larger so that the tower was located further from adjacent residences and rights-of-way the increased distance might have the effect of screening and buffering the visual impacts of the existing tower. Attempting to screen the existing tower and antennae with foliage would not be effective because most surrounding

properties are at the same elevation or only slightly higher than the subject property. Therefore, given the constraints of the subject property, it is not reasonably possible to reduce the visual impacts of the existing tower without modifying its height, location and/or configuration.

Section 2: The approval of the subject commercial use at this specific location will result in significant adverse effects on adjacent property or the permitted use thereof because the commercial use of some of the antennae constitutes an intensification of the use of the antennae, and this intensification of use financially benefits the applicant and his business while causing negative visual impacts from the location, height and size of the antenna tower upon surrounding residential properties. Currently, the tower is visually prominent within the neighborhood and although reducing the height of certain elements of the structure might somewhat improve the appearance of the antenna array, it would not eliminate the negative visual aspects of the tower related to its height, close proximity to surrounding residences and lack of screening or buffers. Therefore, although the approval of the proposed use would not create new adverse visual impacts, it would perpetuate existing adverse visual impacts in support of a use that disproportionately benefits the commercial interests of the applicant to the detriment of the immediately surrounding neighborhood. In addition to the visual impacts of the existing antennae tower, the establishment of a commercial antenna of this size and scale in the *Del Cerro* neighborhood would establish precedent for, and contribute to, adverse cumulative visual impacts due to future proposals for similar projects. Such proposals are likely—given the neighborhood's elevation, topography and unique geographic setting—and would have significant adverse cumulative effects upon neighborhood aesthetics and residential property values.

Section 3: The proposed use is contrary to the General Plan, which contains the following goals and policies:

> *It is the goal of the City of Rancho Palos Verdes to preserve and enhance the community's quality living environment; to enhance the visual character and physical quality of existing neighborhoods; and to encourage the development of housing in a manner which adequately serves the needs of all present and future residents of the community.* [Rancho Palos Verdes General Plan, Urban Environment Element, Activity Area Goals (p. 56)]
>
> *The City shall discourage industrial and major commercial activities due to the terrain and environmental characteristics of the City. Commercial development shall be carefully and strictly controlled, and limited to consideration of convenience or neighborhood service facilities.* [Rancho Palos Verdes General Plan Urban Environment Element, Activity Area Goals (p. 56)]
>
> *It shall be a goal of the City to ensure adequate public utilities and communications services to all residents, while maintaining the quality of the environment.* [Rancho Palos Verdes General Plan, Urban Environment Element, Infrastructure Goals (p. 100)]
>
> *Require adequate landscaping or buffering techniques for all new and existing facilities and networks, in order to reduce the visual impacts of many infrastructure facilities and networks.* [Rancho Palos Verdes General Plan, Urban Environment Element, Infrastructure Policy No. 8 (p. 138)]

Although these goals and policies acknowledge the need for commercial development and the provision of communications services for the City's residents, they also call upon the City to balance these community needs with the preservation of the quality of the City's residential neighborhoods. The City has attempted to balance these objectives by encouraging the installation of commercial antennae in non-single-family residential areas, and the utilization of screening techniques to camouflage the appearance of commercial antennae to the maximum extent practicable. As a result, most commercial antennae previously approved by the City have been proposed for properties that are not zoned or used for single-family residential purposes, and have employed screening techniques to fully (or at least partially) mask the appearance of the antennae. In this case, the subject property and surrounding neighborhood are designated Residential, 1-2 DU/acre in the City's General Plan, which is a land use designation intended to accommodate low-density neighborhoods of detached, single-family homes and related accessory uses and structures. The use of the existing antenna support structure and array for amateur purposes is an accessory use to the primary use of the property as a single-family residence, but the proposed commercial use of some of the existing antennae constitutes an intensification of the use of the tower such that the use of the antenna support structure and array is no longer clearly subordinate to the primary permitted use of the subject property. Because this application involves approval of the commercial use of the antennae, which previously was conducted in violation of the Municipal Code, it cannot be determined with certainty how many of the existing antennae were placed on the site for the commercial use and how many were used solely for amateur purposes in accordance with the prior City approvals. In addition, the size of the site and the close proximity of the tower to surrounding residences provide[] little or no opportunity for effective visual screening and buffering of the tower, which is inconsistent with the General Plan goals and policies discussed in this section.

Section 4: There may be other locations and antenna towers that can accommodate the applicant's proposed commercial transmissions. The applicant has provided evidence

that the FAA's San Pedro Hill site and the County of Los Angeles' antenna site on Crestridge Road are not available to him, and he claims that these are the most technically optimal locations to which he could relocate his facilities. Aside from these two locations, however, the applicant has not provided evidence to support his claim that there are no other viable sites available to him, even if these other sites are less than technically optimal in terms of their use for commercial radio purposes. As such, there may be alternate sites available for the applicant's proposed use that would have fewer or no adverse impacts on surrounding properties than the proposed location at 44 Oceanaire Drive does.

Section 5: The proposed project is not consistent with the City's Wireless Communications Antenna Development Guidelines. The site of the proposed project is a single-family residence, which is not consistent with the Commission's preference for the use of non-single-family structures and properties as antenna sites, and the size and scale of the proposed use suggests that it is not clearly ancillary to the primary permitted use of the site as a single-family residence (Guideline No. 2). Although the Guidelines encourage co-location of commercial antennae on existing towers (Guideline No. 3), the future placement of additional commercial antennae at this site would not be consistent with the general intent of the Guidelines to balance the need to provide wireless communications coverage with the need to maintain the quality of life for residents. In addition, although the existing tower does not impair protected views, as defined in the City's Development Code, it is highly visible in the neighborhood immediately surrounding the subject property (Guideline No. 4). The approval of the project as currently proposed would disproportionately benefit the applicant, at a significant adverse aesthetic expense to the surrounding residential neighborhood and the general public, resulting in an imbalance of private versus public costs and benefits (Guideline No. 5). Finally, the size and scale of the proposed

project and its close proximity to surrounding residents precludes effective visual screening of the existing antenna support structure and array (Guideline No. 9).

Section 6: The denial of Conditional Use Permit No. 207 is consistent with the local zoning authority reserved to the City of Rancho Palos Verdes by the Telecommunications Act of 1996 (47 U.S.C. 332(c)(7)) for the following reasons:

A. The denial of Conditional Use Permit No. 207 "[does] not unreasonably discriminate among providers of functionally equivalent services . . . and [does] not prohibit or have the effect of prohibiting the provision of personal wireless services" (47 U.S.C. 332(c)(7), subsections (B)(i)(I) and (II)). There are no "competing" applications for the applicant's proposed services at this site, so the denial of the proposed project cannot be said to discriminate between the applicant's project and that of any other service provider. In addition, the denial of this specific proposal does not prohibit the provision of wireless communications services because the applicant still has the ability to propose the relocation of these services to another site that meets all of the required findings for approval by the City. While the City has previously approved applications for commercial antennae for a variety of wireless services and service providers, these applications have generally been proposed for properties that were not zoned or used for single-family residential purposes.

B. The application for this Conditional Use Permit was deemed complete by City Staff, on January 31, 2000. The City has acted on the applicant's request for Conditional Use Permit No. 207 "within a reasonable period of time after the request [was] duly filed with [the City], taking into account the nature and scope of such request" (47 U.S.C. 332(c)(7), subsection (B)(ii)). This application has been processed by the City in a timely

fashion and in accordance with the time lines established by the State Permit Streamlining Act and CEQA.

C. The decision to deny the application for Conditional Use Permit No. 207 "[is] in writing and supported by substantial evidence contained in a written record" (47 U.S.C. 332(c)(7), subsection (B)(iii)). This Resolution, along with the Staff report, plans, public correspondence and the Minutes of these proceedings, all of which are incorporated herein by this reference, provides a written record of the basis for the Planning Commission's decision in this matter.

D. In denying the application for Conditional Use Permit No. 207, the City has not "[regulated] the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communications] Commission's regulations concerning such emissions" (47 U.S.C. 332(c)(7), subsection (B)(iv)). Although radio frequency emission[s] are identified as an environmental effect in the draft Mitigated Negative Declaration prepared for this application, the environmental analysis clearly states that these effects are not significant and not within the City's purview to consider or regulate. Therefore, the Planning Commission's denial of the proposed project is not based in any way upon any actual or perceived environmental effects attributable to radio frequency emissions.

Section 7: The draft Mitigated Negative Declaration that was prepared by Staff, in conjunction with Conditional Use Permit No. 207, is not adopted by the Planning Commission because the Planning Commission finds that the approval of the proposed project will result in significant adverse visual and aesthetic impacts upon properties surrounding the project site, both singularly and cumulatively.

Section 8: Any interested person aggrieved by this decision or by any portion of this decision may appeal to the City Council. Pursuant to Section 17.60.060 of the Rancho Palos Verdes Municipal Code, any such appeal must be filed with the City, in writing, and with the appropriate appeal fee, no later than fifteen (15) days following May 9, 2000, the date of the Planning Commission's final action.

Section 9: For the foregoing reasons and based on the information and findings included in the Staff Report, Minutes and other records of proceedings, the Planning Commission of the City of Rancho Palos Verdes hereby denies, with prejudice, Conditional Use Permit No. 207 for the proposed commercial use of existing antennae on an existing antenna support structure and array located at 44 Oceanaire Drive in the *Del Cerro* neighborhood.

PASSED, APPROVED, AND ADOPTED this 9th day of May 2000, by the following vote:

AYES:	Chairman Lyon, Vice Chairman Clark, Commissioners Cartwright, Long, Mueller, Paulson and Vannorsdall
NOES:	none
ABSTENTIONS:	none
ABSENT:	none

/S/ Frank Lyon
Frank Lyon
Chairman

/S/ Joel Rojas
Joel Rojas, AICP
Director of Planning Building
and Code Enforcement; and, Secretary
to the Planning Commission

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-55681

MARK J. ABRAMS,
Plaintiff-Appellant,

v.

CITY OF RANCHO PALOS VERDES, a municipality;
City of Rancho Palos Verdes City Council,
Defendants-Appellees,

AND

FRANK LYON; JON CARTWRIGHT; THOMAS LONG; CRAIG MUELLER; THEODORE PAULSON; DONALD VANNORSDALL; JOHN MCTAGGART; DOUGLAS W. STERN; LEE BYRD; BARBARA FERRARO; MARILYN LYON; AND LARRY CLARK,
Defendants.

Filed: Mar. 16, 2004

D.C. No. CV-00-09071-SVW

Before: KOZINSKI and T.G. NELSON, Circuit Judges, and RESTANI,* Judge.

The petition for rehearing and the petition for rehearing en banc are DENIED.

*The Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.

APPENDIX G

1. The Communications Act of 1934, as amended by Pub. L. No. 97-259, § 120(a), 96 Stat. 1096, by Pub. L. No. 103-66, § 6002(b)(2)(A), 107 Stat. 1093, and by the Telecommunications Act of 1996, Pub. L. No. 104-104, § 704, 110 Stat. 151, codified as 47 U.S.C. § 332, provides in relevant part:

§ 332. Mobile services

(a) Factors which Commission must consider

In taking actions to manage the spectrum to be made available for use by the private mobile services, the Commission shall consider, consistent with section 151 of this title, whether such actions will—

(1) promote the safety of life and property;

(2) improve the efficiency of spectrum use and reduce the regulatory burden upon spectrum users, based upon sound engineering principles, user operational requirements, and marketplace demands;

(3) encourage competition and provide services to the largest feasible number of users; or

(4) increase interservice sharing opportunities between private mobile services and other services.

(b) Advisory coordinating committees

(1) The Commission, in coordinating the assignment of frequencies to stations in the private mobile services and in the fixed services (as defined by the Commission by rule), shall have authority to utilize assistance furnished by advisory coordinating committees consisting of individuals who are not officers or employees of the Federal Government.

(2) The authority of the Commission established in this subsection shall not be subject to or affected by the provisions of part III of Title 5 or section 1342 of Title 31.

(3) Any person who provides assistance to the Commission under this subsection shall not be considered, by reason of having provided such assistance, a Federal employee.

(4) Any advisory coordinating committee which furnishes assistance to the Commission under this subsection shall not be subject to the provisions of the Federal Advisory Committee Act.

(c) Regulatory treatment of mobile services

(1) Common carrier treatment of commercial mobile services

(A) A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this chapter, except for such provisions of subchapter II of this chapter as the Commission may specify by regulation as inapplicable to that service or person. In prescribing or amending any such regulation, the Commission may not specify any provision of section 201, 202, or 208 of this title, and may specify any other provision only if the Commission determines that—

(i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;

(ii) enforcement of such provision is not necessary for the protection of consumers; and

(iii) specifying such provision is consistent with the public interest.

(B) Upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this title. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this chapter.

(C) The Commission shall review competitive market conditions with respect to commercial mobile services and shall include in its annual report an analysis of those conditions. Such analysis shall include an identification of the number of competitors in various commercial mobile services, an analysis of whether or not there is effective competition, an analysis of whether any of such competitors have a dominant share of the market for such services, and a statement of whether additional providers or classes of providers in those services would be likely to enhance competition. As a part of making a determination with respect to the public interest under subparagraph (A)(iii), the Commission shall consider whether the proposed regulation (or amendment thereof) will promote competitive market conditions, including the extent to which such regulation (or amendment) will enhance competition among providers of commercial mobile services. If the Commission determines that such regulation (or amendment) will promote competition among providers of commercial mobile services, such determination may be the basis for a Commission finding that such regulation (or amendment) is in the public interest.

(D) The Commission shall, not later than 180 days after August 10, 1993, complete a rulemaking required to implement this paragraph with respect to the licensing

of personal communications services, including making any determinations required by subparagraph (C).

(2) Non-common carrier treatment of private mobile services

A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this chapter. A common carrier (other than a person that was treated as a provider of a private land mobile service prior to August 10, 1993) shall not provide any dispatch service on any frequency allocated for common carrier service, except to the extent such dispatch service is provided on stations licensed in the domestic public land mobile radio service before January 1, 1982. The Commission may by regulation terminate, in whole or in part, the prohibition contained in the preceding sentence if the Commission determines that such termination will serve the public interest.

(3) State preemption

(A) Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates. Notwithstanding the first sentence of

this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that—

(i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or

(ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition. If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such periods of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory.

(B) If a State has in effect on June 1, 1993, any regulation concerning the rates for any commercial mobile service offered in such State on such date, such State may, no later than 1 year after August 10, 1993, petition the Commission requesting that the State be authorized to continue exercising authority over such rates. If a State files such a petition, the State's existing regulation shall, notwithstanding subparagraph (A), remain in effect until the Commission completes all action (including any reconsideration) on such petition. The Commission shall review such petition in accordance with the procedures established in such subparagraph, shall complete all action (including any

reconsideration) within 12 months after such petition is filed, and shall grant such petition if the State satisfies the showing required under subparagraph (A)(i) or (A)(ii). If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such period of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory. After a reasonable period of time, as determined by the Commission, has elapsed from the issuance of an order under subparagraph (A) or this subparagraph, any interested party may petition the Commission for an order that the exercise of authority by a State pursuant to such subparagraph is no longer necessary to ensure that the rates for commercial mobile services are just and reasonable and not unjustly or unreasonably discriminatory. The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition in whole or in part.

(4) Regulatory treatment of communications satellite corporation

Nothing ir this subsection shall be construed to alter or affect the regulatory treatment required by title IV of the Communications Satellite Act of 1962 [47 U.S.C.A. § 741 et seq.] of the corporation authorized by title III of such Act [47 U.S.C.A. § 731 et seq.].

(5) Space segment capacity

Nothing in this section shall prohibit the Commission from continuing to determine whether the provision of space segment capacity by satellite systems to providers of commercial mobile services shall be treated as common carriage.

(6) Foreign ownership

The Commission, upon a petition for waiver filed within 6 months after August 10, 1993, may waive the application of section 310(b) of this title to any foreign ownership that lawfully existed before May 24, 1993, of any provider of a private land mobile service that will be treated as a common carrier as a result of the enactment of the Omnibus Budget Reconciliation Act of 1993, but only upon the following conditions:

(A) The extent of foreign ownership interest shall not be increased above the extent which existed on May 24, 1993.

(B) Such waiver shall not permit the subsequent transfer of ownership to any other person in violation of section 310(b) of this title.

(7) Preservation of local zoning authority

(A) General authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

(C) Definitions

For purposes of this paragraph—

(i) the term "personal wireless services" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term "personal wireless service facilities" means facilities for the provision of personal wireless services; and

(iii) the term "unlicensed wireless service" means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v) of this title).

(8) Mobile services access

A person engaged in the provision of commercial mobile services, insofar as such person is so engaged, shall not be required to provide equal access to common carriers for the provision of telephone toll services. If the Commission determines that subscribers to such services are denied access to the provider of telephone toll services of the subscribers' choice, and that such denial is contrary to the public interest, convenience, and necessity, then the Commission shall prescribe regulations to afford subscribers unblocked access to the provider of telephone toll services of the subscribers' choice through the use of a carrier identification code assigned to such provider or other mechanism. The requirements for unblocking shall not apply to mobile satellite services unless the Commission finds it to be in the public interest to apply such requirements to such services.

(d) Definitions

For purposes of this section—

(1) the term "commercial mobile service" means any mobile service (as defined in section 153 of this title) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission;

(2) the term "interconnected service" means service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) or service for which a request for interconnection is pending pursuant to subsection (c)(1)(B) of this section; and

(3) the term "private mobile service" means any mobile service (as defined in section 153 of this title) that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.

2. Section 601 of the Telecommunications Act of 1996, 110 Stat. 143, codified as 47 U.S.C. 152 note, provides in relevant part:

Applicability of Consent Decrees and Other Law

* * * * *

(b) Antitrust laws.—

(1) Savings clause.—Except as provided in paragraphs (2) and (3), nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.

* * * * *

(c) Federal, State, and local law.—

(1) No implied effect.—This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

(2) State tax savings provision.—Notwithstanding paragraph (1), nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede, or authorize the modification, impairment, or supersession of, any State or local law pertaining to taxation, except as provided in sections 622 and 653(c) of the Communications Act of 1934 and section 602 of this Act.

3. Section 1983 of Title 42 of the United States Code provides, in relevant part:

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

4. Section 1988 of Title 42 of the United States Code provides, in relevant part:

§ 1988. Proceedings in vindication of civil rights

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 *et seq.*], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb *et seq.*], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc *et seq.*], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d *et seq.*], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity

such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(c) Expert fees

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

APPENDIX H